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NOTES

LOSS OF CONSORTIUM, CONTRIBUTORY NEGLIGENCE, AND CONTRIBUTION: AN OLD PROBLEM AND A NEW SOLUTION

The marital relationship is a familial interest which has received judicial recognition and protection.¹ The usual remedy for the tortious impairment of this relationship is an action for loss of consortium.² A cause of action for loss of consortium typically arises in situations where one spouse has been injured negligently by a third party³ and the other spouse brings a claim against the third party to recover damages for any ensuing loss of consortium.⁴ The courts, however, are not in agreement over which elements of the loss appropriately may be considered in a loss of consortium action. Some courts limit the elements of the claim to various intangible or "sentimental" loss items such as love, companionship, affection, sexual enjoyment, the prospects of parenthood, cooperation, and aid.⁵ In contrast, other courts expand this definition of

¹ See *Montgomery v. Stephan*, 359 Mich. 33, 48, 101 N.W.2d 227, 234 (1960) (relief is extended to one spouse where the other is wrongfully injured because society has an interest in the protection of the family as the social unit upon which American society rests); *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978) ("the marital relationship is the primary familial interest recognized by the courts"). See *infra* note 2 and accompanying text.

² *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978). Historically, actions for loss of consortium arose from the early master/servant common law. *Montgomery v. Stephan*, 359 Mich. 33, 39, 101 N.W.2d 227, 230 (1960). The husband and wife were seen as one entity, and the husband was entitled to the services of the wife. *Id.* Under this common law view, the husband was entitled to recover for loss of his wife's services when she was injured by another's tortious conduct. See *id.* The wife, on the other hand, did not have a right to the husband's services under the common law and could not maintain an action for loss of services or for the other elements of consortium such as society, intercourse and affection. *Id.* at 40-41, 101 N.W.2d at 230. This doctrine prevailed until 1950 when the United States Court of Appeals for the District of Columbia held that the wife could recover for her loss of consortium resulting from negligent injury to her husband. *Hitaffer v. Argonne Co.*, 183 F.2d 811, 819 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950). Today, the prevailing view is that both the husband and the wife have the right to bring an action for loss of consortium. See *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 284-85 & n.11 (1980) (listing forty-one states and the District of Columbia allowing recovery for loss of consortium by a wife or a couple).

³ See *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 167-68, 302 N.E.2d 555, 564 (1973) (A claim for loss of consortium arises "from personal injury of the other spouse caused by negligence of a third person. . . ."); *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978). See, e.g., *Macon v. Seaward Constr. Co., Inc.*, 555 F.2d 1, 1 (1st Cir. 1977); *Nelson v. Busby*, 246 Ark. 247, 248, 437 S.W.2d 799, 800 (1969). A loss of consortium claim can arise from an intentional tort as well. See *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal.3d 382, 408, 525 P.2d 669, 686, 115 Cal. Rptr. 765, 782 (1974) (either spouse has a cause of action for loss of consortium caused by a negligent or intentional injury to the other spouse by a third party).

⁴ See, e.g., *Nelson v. Busby*, 246 Ark. 247, 248, 437 S.W.2d 799, 800 (1969); *Lantis v. Condon*, 95 Cal. App.3d 152, 157, 157 Cal. Rptr. 22, 24 (1979); *Fuller v. Buhrow*, 292 N.W.2d 672, 672 (Iowa 1980); *Felch v. General Rental Co.*, 1981 Mass. Adv. Sh. 1189, 1190, 421 N.E.2d 67, 69.

⁵ See, e.g., *Fuller v. Buhrow*, 292 N.W.2d 672, 675 (Iowa 1980); *Felch v. General Rental Co.*, 1981 Mass. Adv. Sh. 1189, 1195, 421 N.E.2d 67, 72 (1981); *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978).

consortium to include the more tangible element of loss of services.⁶ Typically, these services include assisting with the operation and maintenance of the family home⁷ as well as providing counseling and advice.⁸ Yet, regardless of which definition is adopted, the essential claim is the same. The spouse bringing an action for loss of consortium (the "consortium spouse") is seeking to recover for a loss he⁹ or she suffered as a result of personal injuries sustained directly by the other spouse (the "injured spouse").

Although most jurisdictions recognize a cause of action for loss of consortium,¹⁰ a problem arises when the injured spouse's own negligence contributes to his injuries. The question then becomes what effect, if any, the contributory negligence¹¹ of the injured spouse has, or should have, upon the cause of action or recovery of the consortium spouse. The effect of the injured spouse's contributory negligence on the consortium spouse's claim depends upon whether the jurisdiction views the cause of action for loss of consortium as an independent claim or as a claim dependent upon the injured spouse's right to recover for his own personal injuries.¹² Viewing loss of consortium as an independent claim assumes that the claim exists separately from the injured spouse's ability to recover damages.¹³ Under this view, the consortium spouse's recovery of damages would be unaffected by the injured spouse's negligence.¹⁴ In contrast, viewing a consortium claim as a derivative, or otherwise dependent, cause of action assumes that the consortium claim is integrally related to the injured spouse's ability to recover damages.¹⁵ In jurisdictions adopting this dependent approach, the consortium spouse's recovery of damages would be barred or

⁶ See, e.g., *Hitafer v. Argonne Co.*, 183 F.2d 811, 814 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950); *Montgomery v. Stephan*, 359 Mich. 33, 36, 101 N.W.2d 227, 228 (1960).

⁷ See *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal.3d 382, 409 n.31, 525 P.2d 669, 687 n.31, 115 Cal. Rptr. 765, 783 n.31 (1974).

⁸ See *Hitafer v. Argonne Co.*, 183 F.2d 811, 819 (D.C. Cir. 1950).

⁹ For the sake of uniformity, "he," "his," and "him" will be used throughout this note to refer to both male and female spouses unless otherwise specified or indicated by the context.

¹⁰ See *supra* note 2.

¹¹ Contributory negligence is conduct by the plaintiff that falls below the standard to which he is required to conform for his own protection and that contributes as a legal cause to the plaintiff's harm. See RESTATEMENT (SECOND) OF TORTS § 463 (1965); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 65, at 416-17 (4th ed. 1971) [hereinafter cited as PROSSER]. The traditional view is that a plaintiff's contributory negligence is a complete defense for the other party, even if the other party has been negligent as well. See *Gulf, M. & O. R.R. Co. v. Freund*, 183 F.2d 1005, 1007 (8th Cir.), *cert. denied*, 340 U.S. 904 (1950). This effect of the plaintiff's own negligence which bars him from maintaining his action and recovering damages has been termed the contributory negligence doctrine. See *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 809-10, 532 P.2d 1226, 1230, 119 Cal. Rptr. 858, 862 (1975); *Kirby v. Larson*, 400 Mich. 585, 613-15, 256 N.W.2d 400, 413-14 (1977).

¹² See *infra* notes 26-47 and accompanying text. See generally Annot., 21 A.L.R.3d 469 (1968 & Supp. 1982).

¹³ See *infra* notes 38-47 and accompanying text.

¹⁴ See, e.g., *Lantis v. Condon*, 95 Cal. App.3d 152, 157-60, 157 Cal. Rptr. 22, 24-26 (1979); *Fuller v. Buhrow*, 292 N.W.2d 672, 673 (Iowa 1980); *Felch v. General Rental Co.*, 1981 Mass. Adv. Sh. 1189, 1192-95, 421 N.E.2d 67, 70-72 (1981).

¹⁵ See *infra* notes 26-37 and accompanying text.

limited by the injured spouse's negligence.¹⁶ Moreover, in jurisdictions limiting or barring the consortium spouse's recovery of damages according to the injured spouse's negligence, the effect of such negligence on the consortium spouse's recovery of damages may vary depending on whether the jurisdiction adheres to a contributory or a comparative negligence doctrine.¹⁷ In contributory negligence jurisdictions, the contributory negligence of the injured spouse generally bars recovery of damages by the consortium spouse.¹⁸ Simi-

¹⁶ See *infra* notes 17-19 and accompanying text. Courts appear to express two differing views as to the effect of the injured spouse's contributory negligence. Some courts indicate that the contributory negligence of the injured spouse bars or limits the maintenance of a *cause of action* by the consortium spouse, thereby barring or limiting the consortium spouse's recovery of damages. See, e.g., *Ross v. Cuthbert*, 239 Or. 429, 432, 397 P.2d 529, 530 (1964) (contributory negligence doctrine; contributory negligence of injured spouse bars consortium spouse's cause of action for loss of consortium); *Abbate v. Big V Supermks., Inc.*, 95 Misc.2d 483, 485, 407 N.Y.S.2d 821, 823 (N.Y. Sup. Ct. 1978) (comparative negligence doctrine; consortium spouse's action abated to same extent that negligent injured spouse's right to recover is diminished). Other courts, however, refer to the injured spouse's contributory negligence as limiting or barring the consortium spouse's *recovery of damages*; there is no emphasis on limiting or barring the underlying cause of action as such. See, e.g., *Pioneer Constr. Co. v. Bergeron*, 170 Colo. 474, 478, 462 P.2d 589, 591 (1969) (contributory negligence doctrine; contributory negligence of injured spouse bars recovery of damages for loss of consortium); *White v. Lunder*, 66 Wis.2d 563, 574, 225 N.W.2d 442, 449 (1975) (comparative negligence doctrine; negligence of injured spouse bars or limits recovery of consortium spouse). This apparent distinction might be only the result of the courts' use of different terminology to express the same notion. Under either view the practical result is that the consortium spouse's recovery of damages is limited or barred according to the injured spouse's contributory negligence. Insofar as any actual distinction exists between the two views, this note uses phrases such as "limits or bars *recovery of damages*" to cover both approaches.

¹⁷ Under the contributory negligence doctrine, the plaintiff's own negligent conduct bars his recovery completely. PROSSER, *supra* note 11, § 65, at 417. The comparative negligence doctrine, however, is based on the principle that liability for damages should be borne by those individuals whose negligence caused the harm in direct proportion to their respective fault. *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975). In *Li*, the California Supreme Court noted that "fault," as used here, means nothing more than negligence in the accepted legal sense. *Id.*, at 813 n.6a, 532 P.2d at 1232 n.6a, 119 Cal. Rptr. at 864 n.6a. In a "pure" comparative negligence system, the recovery of the plaintiff is diminished in proportion to the amount of negligence attributable to him. See *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975) (adopting "pure" form of comparative negligence by judicial decision); R.I. GEN. LAWS § 9-20-4 (Supp. 1981). In such a system, the plaintiff would be barred from recovery only if he were one hundred percent negligent. See *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 827-28, 532 P.2d 1226, 1242-43, 119 Cal. Rptr. 858, 874-75 (1975). Under "fifty percent" comparative negligence systems, the plaintiff's recovery likewise must be diminished in proportion to the amount of negligence attributable to him. See PROSSER, *supra* note 11, § 67, at 436-37. Once the proportion of the plaintiff's negligence with respect to the defendant's negligence reaches an established "cutoff" point, however, the plaintiff's recovery is barred. See *id.* In some states this point is reached when the plaintiff's negligence is as great as the defendant's. See, e.g., COL. REV. STAT. § 13-21-111(1) (1973). In other states this point is not reached until the plaintiff's negligence is greater than the defendant's. See, e.g., N.H. REV. STAT. ANN. § 507:7-a (Supp. 1969).

¹⁸ See *Pioneer Constr. Co. v. Bergeron*, 170 Colo. 474, 478, 462 P.2d 589, 591 (1969); *McKee v. Neilson*, 444 P.2d 194, 198 (Okla. 1968); *Ross v. Cuthbert*, 239 Or. 429, 432, 397 P.2d 529, 530 (1964). But see *Fuller v. Buhrow*, 292 N.W.2d 672, 676 (Iowa 1980). See *supra* note 16.

larly, in comparative negligence jurisdictions, the recovery of damages by the consortium spouse would be limited or barred to the same extent that the recovery of damages by the injured spouse would be limited or barred in that spouse's action.¹⁹

This note submits that the cause of action for loss of consortium should be considered independent of the injured spouse's cause of action or right to recover damages. As a result, the consortium spouse should be granted full recovery of damages despite the injured spouse's negligence. The note begins by examining the rationales propounded in support of the view that the consortium spouse's recovery of damages under a cause of action for loss of consortium should be limited or barred by the injured spouse's negligence. Next, the view that the consortium spouse's recovery of damages under a cause of action for loss of consortium should not be limited or barred by the injured spouse's negligence will be discussed. The note then examines loss of consortium as an independent cause of action. The loss of consortium action will be analyzed, and the rationales advanced in support of the view that the consortium spouse's recovery of damages should be limited or barred by the injured spouse's negligence will be evaluated. This note suggests that these rationales fail to assess accurately the nature of consortium claims. Subsequently, the note proposes that permitting contribution among joint tortfeasors in a consortium action, including the negligent injured spouse, largely eliminates concerns over fairness raised by granting the consortium spouse full recovery. Moreover, the way in which contribution is consistent with viewing loss of consortium as an independent cause of action will be demonstrated. Finally, after examining interspousal immunity in the context of loss of consortium actions, this note urges abrogation of interspousal immunity in relation to loss of consortium actions, at least to the extent that the doctrine prevents contribution in such actions, in jurisdictions retaining the doctrine in this setting.

I. CONSORTIUM SPOUSE'S RECOVERY OF DAMAGES FOR LOSS OF CONSORTIUM AFFECTED BY NEGLIGENCE OF INJURED SPOUSE

Courts traditionally have held that the consortium spouse's recovery of damages under a cause of action for loss of consortium²⁰ is limited or barred by the contributory negligence of the injured spouse.²¹ Various theories and ra-

¹⁹ See, e.g., *Eggert v. Working*, 599 P.2d 1389, 1391 (Alaska 1979); *Ferguson v. Ben M. Hogan Co.*, 307 F. Supp. 658, 665 (W.D. Ark. 1969); *Hamm v. City of Milton*, 358 So.2d 121, 123 (Fla. Dist. Ct. App. 1978); *Abbate v. Big V Supermkts., Inc.*, 95 Misc.2d 483, 485, 407 N.Y.S.2d 821, 823 (N.Y. Sup. Ct. 1978); *White v. Lunder*, 66 Wis.2d 563, 574-76, 225 N.W.2d 442, 449 (1975). See *supra* note 16.

²⁰ A loss of consortium action is an action brought by one spouse against a negligent third party for loss of the other spouse's society, affection, services, and related items resulting when the latter spouse has sustained personal injuries negligently caused by the third party. See *supra* notes 2-10 and accompanying text.

²¹ See *Pioneer Constr. Co. v. Bergeron*, 170 Colo. 474, 478, 462 P.2d 589, 591 (1969); *Ross v. Cuthbert*, 239 Or. 429, 432, 397 P.2d 529, 530 (1964); see, e.g., *Eggert v. Working*, 599

tionales have been propounded in support of this traditional rule.²² Two such rationales in particular are offered by modern courts as justifications for support of this rule. One of these rationales, the derivative theory, suggests that the consortium claim is integrally related to and dependent upon the injured spouse's ability to recover damages.²³ This rationale focuses on the conceptual basis of the consortium claim. The other rationale, the fairness theory, is founded upon more practical considerations. The fairness theory suggests that the consortium spouse's recovery should be limited because of equitable concerns.²⁴ While these two rationales stem from somewhat different bases, both rationales support the notion that the negligence of the injured spouse should limit or bar the consortium spouse's recovery of damages under a cause of action for loss of consortium.²⁵

A. The Derivative Theory

Perhaps the most frequently advanced basis for holding that an injured spouse's contributory negligence bars or limits recovery of damages for loss of consortium by the other spouse is that the consortium action is derivative.²⁶ Derivative is essentially a general, undefined term which indicates that the consortium claim flows from the injured spouse's cause of action.²⁷ Under this ra-

P.2d 1389, 1391 (Alaska 1979); Hamm v. City of Milton, 358 So.2d 121, 123 (Fla. Dist. Ct. App. 1978); Peters v. Bodin, 242 Minn. 489, 496, 65 N.W.2d 917, 922 (1954); Abbate v. Big V Supermkts., Inc., 95 Misc.2d 483, 485, 407 N.Y.S.2d 821, 823 (N.Y. Sup. Ct. 1978); McKee v. Neilson, 444 P.2d 194, 198 (Okla. 1968); White v. Lunder, 66 Wis.2d 563, 575-76, 225 N.W.2d 442, 449 (1975).

But see, e.g., Macon v. Seaward Constr. Co., Inc., 555 F.2d 1, 2 (1st Cir. 1977); Lantis v. Condon, 95 Cal. App.3d 152, 157-58, 157 Cal. Rptr. 22, 24-25 (1979); Fuller v. Buhrow, 292 N.W.2d 672, 676 (Iowa 1980); Felch v. General Rental Co., 1981 Mass. Adv. Sh. 1189, 1193-94, 421 N.E.2d 67, 70-71 (1981). *See supra* note 16.

²² One such theory, based upon imputed negligence, was propounded nearly a century ago by the United States Court of Appeals for the Eighth Circuit. Chicago, B. & Q. R.R. Co. v. Honey, 63 F. 39, 40-44 (8th Cir. 1894). Under this theory, where the husband assumed that the wife was competent to control her own movements and to provide for her own safety, he was responsible for her contributory negligence. *Id.* at 41. Since her contributory negligence was imputed to him, the husband was prevented from maintaining an action for loss of consortium. *Id.* at 40-44. *See infra* note 123.

Another theory formulated in support of the traditional rule is based on assignment principles. *See infra* note 30. Additionally, it has even been suggested that since the traditional rule has been in existence for so long, the courts should abide by it. *See infra* note 33.

²³ *See infra* notes 26-30 and accompanying text.

²⁴ *See infra* notes 31-37 and accompanying text.

²⁵ *See infra* notes 26-37 and accompanying text.

²⁶ *See* Rieke v. Brodof, 501 S.W.2d 66, 67 n.2 (Mo. Ct. App. 1973). For cases decided under the comparative negligence doctrine *see, e.g.,* Nelson v. Busby, 246 Ark. 247, 254-55, 437 S.W.2d 799, 803 (1969); Hamm v. City of Milton, 358 So.2d 121, 123 (Fla. Dist. Ct. App. 1978); Abbate v. Big V Supermkts., Inc., 95 Misc.2d 483, 485, 407 N.Y.S.2d 821, 823 (N.Y. Sup. Ct. 1978); White v. Lunder, 66 Wis.2d 563, 574, 225 N.W.2d 442, 449 (1975). For cases decided under the contributory negligence doctrine *see, e.g.,* Peters v. Bodin, 242 Minn. 489, 496, 65 N.W.2d 917, 922 (1954); Huff v. Trowbridge, 439 S.W.2d 493, 498 (Mo. 1969).

²⁷ *See infra* notes 92-98 and accompanying text.

tionale, the consortium spouse's right to recover damages for loss of consortium is related directly to the right of the injured spouse to recover damages for his own personal injury.²⁸ Accordingly, if the wife, as the injured spouse, could not recover in her action for personal injuries because she was contributorily negligent, then the husband could not recover damages in his action for loss of consortium against the same defendant.²⁹ Essentially, in situations where the injured spouse is contributorily negligent, the consortium spouse's recovery of damages would be limited or barred to the extent that the injured spouse's recovery of damages would be limited or barred.³⁰

B. The Fairness Theory

At least one court has suggested a less technical reason for deciding that the contributory negligence of the injured spouse should limit or bar the consortium spouse's recovery of damages for loss of consortium. This rationale might best be viewed as a fairness argument. In *Ross v. Cuthbert*,³¹ the Oregon Supreme Court indicated that it may not be fair for a third party tortfeasor to pay all of the damages in a loss of consortium action when the injured spouse's negligence made that spouse responsible for some of those damages.³² The court acknowledged that perhaps it is not fair to allow a family to "team up" against a third party and allow the consortium spouse to recover in the consortium spouse's name when the negligent injured spouse could not have recovered.³³ Also, where the consortium action is viewed as simply an "academic

²⁸ See, e.g., *Eggert v. Working*, 599 P.2d 1389, 1390-91 (Alaska 1979); *Nelson v. Busby*, 246 Ark. 247, 254-55, 437 S.W.2d 799, 803 (1969); *Peters v. Bodin*, 242 Minn. 489, 496, 65 N.W.2d 917, 922 (1954).

²⁹ See *Augenblick v. Augenblick*, 203 Misc. 360, 362, 117 N.Y.S.2d 69, 71 (N.Y. Sup. Ct. 1952).

³⁰ See *supra* notes 16-19 and accompanying text. Another theory, which is related to the derivative theory, suggests that the consortium action is governed by assignment principles. See *Stuart v. Winnie*, 217 Wis. 298, 305-06, 258 N.W. 511, 613-14 (1935). Under this assignment theory, there is only one cause of action, and this action belongs to the injured spouse. *Id.* As a result of the marital relation and its attendant rights and obligations, that part of the injured spouse's cause of action which is for loss of services to the consortium spouse is assigned to the consortium spouse by operation of law. *Id.*, 258 N.W. at 614. The assigned portion of the injured spouse's cause of action, being derived from that spouse, continues in the consortium spouse subject to any defenses that existed against the injured spouse. *Id.* at 305, 258 N.W. at 614. The underlying principle is that "the assignee of a cause of action stands in the shoes of the assignor." *Id.* at 305-06, 258 N.W. at 614. See *infra* note 123.

³¹ 239 Or. 429, 397 P.2d 529 (1964).

³² *Id.* at 435, 397 P.2d at 531. Essentially, this concern is predicated upon the "all or nothing" results produced under the contributory negligence doctrine. *Id.* To the extent that the consortium action arises in a comparative negligence jurisdiction, however, this concern loses much of its substance.

³³ *Ross v. Cuthbert*, 239 Or. 429, 435, 397 P.2d 529, 531-32 (1964). In holding that the negligence of the injured spouse barred the maintenance of an action for loss of consortium by the other spouse, the *Ross* court stated: "Having been settled, and since we find in ourselves no disposition to change it, we abide by the settled rule." *Id.* at 435-36, 397 P.2d at 532. Courts applying this line of reasoning often discuss all or most of the other arguments offered in support of the rule, but invariably state the rule without enunciating which rationale is the correct or pre-

addendum,"³⁴ and where the husband and wife are seen as an "economic unit,"³⁵ this fairness concern encompasses the notion that a "double recovery" should not be allowed. For example, in a comparative negligence jurisdiction the injured spouse may be able to recover damages, but the damages must be reduced by the amount of his fault.³⁶ Allowing the consortium spouse full recovery under these circumstances might be deemed to be an additional indirect recovery by the negligent injured spouse. Since, under this view, the consortium recovery would be seen as simply additional compensation for the same injury, the consortium award may appear inequitable from the third party's standpoint.³⁷

Under both the derivative and fairness theories, the consortium spouse's recovery of damages for loss of consortium is limited or barred not by the negligence of the consortium spouse, but rather, by the negligence of the injured spouse. By limiting or barring the consortium spouse's recovery of damages because of the injured spouse's negligence, these theories make the consortium spouse's recovery of damages dependent upon the legal effect of the injured spouse's actions. Both the derivative and fairness theories tend to equate the position of the consortium spouse in his action against a third party with that of the injured spouse in his action against the third party. Under both theories, therefore, the consortium spouse's right to recover damages for loss of consortium is dependent upon the injured spouse's right to recover damages for personal injuries sustained by him. In this sense loss of consortium is not regarded as an independent cause of action.

II. CONSORTIUM SPOUSE'S RECOVERY OF DAMAGES FOR LOSS OF CONSORTIUM NOT AFFECTED BY NEGLIGENCE OF INJURED SPOUSE

Although in actions for loss of consortium the negligence of the injured spouse traditionally has been held to bar or limit recovery of damages by the

ferred one. See, e.g., *Pioneer Constr. Co. v. Bergeron*, 170 Colo. 474, 478-83, 462 P.2d 589, 591-94 (1964); *McKee v. Neilson*, 444 P.2d 194, 197-198 (Okla. 1968). This position is also taken by the RESTATEMENT (SECOND) OF TORTS § 494 (1965). The RESTATEMENT states as a rule that "[T]he plaintiff is barred from recovery for an invasion of his legally protected interest in the health or life of a third person which results from the harm or death of such third person, if the negligence of such third person would have barred his own recovery." *Id.* Comment c adds that the negligence of the third person bars the plaintiff's recovery only to the extent that it would do so if it were his own. *Id.* at Comment c. In essence, the courts have followed this precedent for such a long time that it has gained the status of a justification in itself. See *infra* note 139.

³⁴ See Belli with Wilkinson, *Loss of Consortium: Academic Addendum or Substantial Right?*, 16 TRIAL 20, 20 (Feb. 1980) [hereinafter cited as Belli].

³⁵ See *Eggert v. Working*, 599 P.2d 1389, 1391 (Alaska 1979) (the husband and wife are in effect, if not in law, an "economic unit").

³⁶ See *supra* note 17.

³⁷ This view presupposes that there is only one injury to both spouses. Under the view of the consortium action as independent, however, there are two distinct plaintiffs, the injured spouse and the consortium spouse, who each suffer a direct harm. See *supra* notes 40-47 and accompanying text.

consortium spouse,³⁸ some courts recently have repudiated this rule.³⁹ These courts have held that the negligence of the injured spouse should not affect the recovery of the consortium spouse.⁴⁰ The central reason courts offer for this result is that the action for loss of consortium is independent of the personal injury action of the injured spouse.⁴¹ Under this view, the spouse suing for loss of consortium is enforcing an independent right, even though the claim is based on the same set of facts as the other spouse's action for personal injuries.⁴² In other words, the nature of the respective claims should be analyzed, not the source of the injuries.⁴³ The view of the consortium claim as independent suggests that the loss of consortium action never belonged to the injured spouse, just as the suit for personal injuries never belonged to the consortium spouse.⁴⁴ While the cause of action for loss of consortium "arises" from the injuries of the injured spouse, the harm suffered by the consortium spouse is personal to that spouse.⁴⁵ Loss of the injured spouse's consortium impairs "wholly separate and distinct" interests of the other spouse, such as the morally and legally sanctioned privilege of copulation or procreation.⁴⁶ In effect, the consortium spouse is being deprived of the full enjoyment of the marital relationship.⁴⁷

III. LOSS OF CONSORTIUM AS AN INDEPENDENT CAUSE OF ACTION

Under the view that loss of consortium is an independent cause of action, the consortium claim is seen as existing separately and distinctly from the injured spouse's claim for personal injuries.⁴⁸ Accordingly, under this view the injured spouse's negligence has no effect on the consortium spouse's recovery of damages.⁴⁹ In the loss of consortium context, the loss of consortium action

³⁸ See *supra* notes 15-19 and 27-37 and accompanying text.

³⁹ See, e.g., *Macon v. Seaward Constr. Co., Inc.*, 555 F.2d 1, 2 (1st Cir. 1977); *Lantis v. Condon*, 95 Cal. App.3d 152, 157-58, 157 Cal. Rptr. 22, 24-25 (1979); *Fuller v. Buhrow*, 292 N.W.2d 672, 676 (Iowa 1980); *Felch v. General Rental Co.*, 1981 Mass. Adv. Sh. 1189, 1193-94, 421 N.E.2d 67, 70-71 (1981).

The traditional rule that the injured spouse's negligence bars or limits the consortium spouse's cause of action or recovery of damages thereunder has been condemned by various legal scholars. PROSSER, *supra* note 11, § 125, at 893; see, e.g., Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, Etc.*, 2 U. CHI. L. REV. 173, 173-93 (1935) [hereinafter cited as Gregory]; James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340, 354-56 (1954).

⁴⁰ See *supra* note 39.

⁴¹ *Macon v. Seaward Constr. Co., Inc.*, 555 F.2d 1, 2 (1st Cir. 1977); *Lantis v. Condon*, 95 Cal. App.3d 152, 157-58, 157 Cal. Rptr. 22, 24-25 (1979); *Fuller v. Buhrow*, 292 N.W.2d 672, 675 (Iowa 1980); *Felch v. General Rental Co.*, 1981 Mass. Adv. Sh. 1189, 1193-94, 421 N.E.2d 67, 70-71 (1981).

⁴² *Felch v. General Rental Co.*, 1981 Mass. Adv. Sh. 1189, 1193, 421 N.E.2d 67, 71 (1981).

⁴³ *Id.* at 1194, 421 N.E.2d at 71.

⁴⁴ *Id.*

⁴⁵ *Lantis v. Condon*, 95 Cal. App.3d 152, 157, 157 Cal. Rptr. 22, 24 (1979).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *supra* notes 40-47 and accompanying text.

⁴⁹ See *supra* notes 14 and 40-47 and accompanying text.

exists between the consortium spouse and the negligent third party, not between the injured spouse and the negligent third party. Since under an independent cause of action theory the consortium spouse's claim for loss of consortium exists independently of the injured spouse's action, the negligence of the injured spouse has no bearing of legal significance on an action by the consortium spouse against the third party causing the loss of consortium.

This note submits that the independent cause of action approach to loss of consortium actions is the more logically sound and equitable approach to such actions. This conclusion is based upon three major reasons. First, the loss of consortium action, arguably, meets all the requirements of a separate, independent negligence action. The independent cause of action treatment given to loss of consortium claims in some specific situations evidences that such requirements are met. Moreover, there are strong policy reasons for treating loss of consortium as an independent cause of action. Second, the derivative and fairness theories advanced in support of the view that loss of consortium is not an independent action fail to assess accurately the nature of the consortium claim. Finally, any unfairness to the parties involved in a consortium suit can be remedied by allowing contribution from the negligent injured spouse.

A. *Analysis of Loss of Consortium Actions*

1. Loss of Consortium and the Elements of a Negligence Action

The independent nature of the consortium claim is demonstrated best by examining the consortium claim in the framework of a negligence action. A cause of action for negligence, essentially, is comprised of four elements. First, the defendant must be under a duty or obligation, recognized by law, to conform to a certain standard of conduct in order to protect others against unreasonable risks.⁵⁰ To conform to this standard of conduct, the defendant must do what a reasonable person would do under the same or similar circumstances.⁵¹ Closely related to this duty of reasonableness is the concept of foreseeability.⁵² A person's duty is determined largely by the foreseeable risk to other persons or property created by his negligent conduct.⁵³ Second, the defendant must breach this duty by failing to conform to the required standard of reasonable care.⁵⁴ Third, a reasonably close causal connection must exist between the defendant's conduct and the resulting injury.⁵⁵ Finally, actual loss or damage to the interests of the plaintiff must result.⁵⁶ Arguably, each of these elements of a negligence action exists in a cause of action for loss of consortium.

⁵⁰ PROSSER, *supra* note 11, § 30, at 143.

⁵¹ *Id.* § 32, at 151.

⁵² *Corso v. Merrill*, 119 N.H. 647, 651, 406 A.2d 300, 303 (1979).

⁵³ See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS*, § 18.2, at 1018 (1956) [hereinafter cited as HARPER & JAMES].

⁵⁴ PROSSER, *supra* note 11, § 30, at 143.

⁵⁵ *Id.*

⁵⁶ *Id.*

It is foreseeable that a person is married, especially since this is a common status among adults in society.⁵⁷ It is foreseeable also that physical injuries suffered by one spouse will result in a certain amount of deprivation and suffering by the other spouse.⁵⁸ The consortium spouse thus can be seen as a distinct and separate plaintiff. Indeed, from the standpoint of the defendant, the consortium spouse is simply a "foreseeable plaintiff" to whom the defendant owes a separate duty of care.⁵⁹ If, for example, the injury suffered by the wife were a broken leg while riding in a vehicle struck by a negligent third party and driven by her contributorily negligent husband, it is unlikely that the husband's negligence would preclude the wife from obtaining full recovery from the third party.⁶⁰ Following this separate plaintiff reasoning, there appears to be no valid reason why injury to a spouse's psychological and emotional state, or to his privilege to engage in sexual activities with the other spouse, should be treated differently than injury to the spouse's physical well-being.⁶¹ The third party owes a duty to the consortium spouse to exercise reasonable care to prevent an unreasonable risk of harm to the consortium spouse.

The loss of consortium action, arguably, meets the other requirements of a separate negligence action as well. There is a breach of this duty where the third party fails to exercise reasonable care, thereby causing injuries to the injured spouse. Furthermore, there is a reasonably close causal connection between the third party's conduct and the consortium spouse's loss. The consortium spouse's loss would not exist but for the conduct of the third party. Also, the harm to the consortium spouse is both foreseeable and directly related to the failure of the third party to conform to the standard of care required by him. Finally, the consortium spouse suffers actual loss and damage as a result of the third party's conduct.

The separate and personal nature of the consortium spouse's loss, as an element of an independent negligence action, is illustrated by *Rodriguez v. Bethlehem Steel Corp.*,⁶² a California Supreme Court case involving a wife's claim

⁵⁷ *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal.3d 382, 400, 525 P.2d 669, 680, 115 Cal. Rptr. 765, 776 (1974) ("One who negligently causes a severely disabling injury to an adult may reasonably expect that the injured person is married. . . . In our society the likelihood that an injured adult will be a married man or woman is substantial. . . .").

⁵⁸ *Id.* In *Rodriguez*, the California Supreme Court stated that "one who negligently causes a severely disabling injury to an adult may reasonably expect that the injured person is married and that his or her spouse will be adversely affected by that injury." *Id.* The court further stated that "in our society the likelihood that an injured adult will be a married man or woman is substantial. . . . [a]nd the probability that the spouse of a severely disabled person will suffer a personal loss by reason of that injury is equally substantial." *Id.* See also *Dziokonski v. Babineau*, 375 Mass. 555, 567, 380 N.E.2d 1295, 1302 (1978) (action for negligent infliction of severe emotional distress; "it is reasonably foreseeable that, if one negligently operates a motor vehicle so as to injure a person, there will be one or more persons sufficiently attached emotionally to the injured person that he or they will be affected").

⁵⁹ *Lantis v. Condon*, 95 Cal. App.3d 152, 157, 157 Cal. Rptr. 22, 24 (1979).

⁶⁰ *Id.*

⁶¹ *Id.* As the *Lantis* court stated, "[t]he law protects equally [the consortium spouse's] sex life and . . . leg." *Id.* at 158, 157 Cal. Rptr. at 25.

⁶² 12 Cal.3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

for loss of consortium resulting from injuries to her husband.⁶³ In *Rodriguez*, a husband and wife had been married for a short time when the husband was injured in an accident.⁶⁴ A blow to his head caused severe spinal cord damage, leaving him paralyzed below the midpoint of his chest and partially paralyzed in one of his arms.⁶⁵ The husband became an invalid and was bedridden a great deal of the time.⁶⁶ The husband suffered from pain, mental anguish, and frustration, and lost all capacity for sexual intercourse and reproduction.⁶⁷ The wife gave up her job to care for him on a twenty-four hour basis.⁶⁸ In light of these circumstances, the Supreme Court of California held that the wife had a cause of action for loss of consortium.⁶⁹

In reaching its holding, the *Rodriguez* court emphasized that the wife had suffered a real and distinct loss.⁷⁰ The court indicated that since the husband may well need all the emotional strength he has just to survive the shock of his injury, the wife will not receive the comfort and moral support from him which she would otherwise experience.⁷¹ Rather, the court noted, the wife might have to give him increased attention and solace.⁷² The court recognized that the wife could no longer enjoy her legally and morally proper privilege of copulation and procreation.⁷³ The *Rodriguez* court explained that the wife was "for all practical purposes, sterilized. . . ."⁷⁴ Additionally, the court noted that the wife was deprived of her full enjoyment of the marital state.⁷⁵ Furthermore, aside from the wife's romantic and sexual activities, the court recognized that her social and recreational life was severely restricted.⁷⁶

Under such circumstances, the wife, the consortium spouse, has indeed suffered a very real and personal loss. While the loss suffered by the consortium spouse might be the most visible element of the negligence action, the consortium claim arguably satisfies the other requirements for a distinct, independent negligence action as well. Moreover, the nature of the consortium claim as an independent negligence action is supported by the independent treatment accorded the consortium action in certain contexts.

⁶³ *Id.* at 385-86, 525 P.2d at 670-71, 115 Cal. Rptr. at 766-67.

⁶⁴ *Id.* at 385, 525 P.2d at 670, 115 Cal. Rptr. at 766.

⁶⁵ *Id.* at 385-86, 525 P.2d at 670, 115 Cal. Rptr. at 766.

⁶⁶ *Id.* at 386, 525 P.2d at 670, 115 Cal. Rptr. at 766.

⁶⁷ *Id.*, 525 P.2d at 671, 115 Cal. Rptr. at 767.

⁶⁸ *Id.*, 525 P.2d at 670, 115 Cal. Rptr. at 766.

⁶⁹ *Id.* at 408-09, 525 P.2d at 686, 115 Cal. Rptr. at 782.

⁷⁰ *Id.* at 385-86 and 399-406, 525 P.2d at 670-71 and 679-84, 115 Cal. Rptr. at 766-67 and 775-80.

⁷¹ *See id.* at 405-06, 525 P.2d at 684, 115 Cal. Rptr. at 780.

⁷² *See id.* at 405, 525 P.2d at 684, 115 Cal. Rptr. at 780.

⁷³ *Id.*, 525 P.2d at 684, 115 Cal. Rptr. at 780. This loss of the privilege to have sexual intercourse and to produce children assumes that the wife chooses to remain married and faithful to her husband.

⁷⁴ *Id.* at 386, 525 P.2d at 671, 115 Cal. Rptr. at 767.

⁷⁵ *Id.* at 405, 525 P.2d at 684, 115 Cal. Rptr. at 780.

⁷⁶ *Id.* at 386, 525 P.2d at 671, 115 Cal. Rptr. at 767.

2. Specific Situations

The independent nature of the consortium action is supported also by the independent treatment loss of consortium claims have received in some specific situations. For instance, some courts have determined that a spouse suing for loss of consortium is entitled to a separate trial before a separate jury.⁷⁷ It is thus possible for different results to occur in the injured spouse's action for negligence and the consortium spouse's action for loss of consortium. The jury in the injured spouse's trial may find that the injured spouse was contributorily negligent and thus reduce or bar that spouse's recovery. In contrast, the jury in the consortium spouse's case may find that the injured spouse was not negligent and subsequently grant the consortium spouse full recovery.⁷⁸ This latter result may not occur in a jurisdiction which holds that the determination of the injured spouse's negligence in his suit has an issue preclusion effect in the consortium spouse's action.⁷⁹ Some courts have held, however, that the finding of contributory negligence in the injured spouse's suit is not conclusive on the negligence issue in the consortium spouse's action.⁸⁰ Moreover, at least one court has indicated that the bar of the injured spouse's claim by the statute of nonclaim⁸¹ does not prevent the tolling of the statute as to the consortium spouse's damages.⁸²

3. Policy Considerations

Along with these considerations of the nature of the consortium action, and the independent treatment given to it in certain situations, there are strong policy reasons for treating loss of consortium as an independent cause of action. Although marriage creates certain rights and obligations between spouses, it does not destroy the separate legal identities of the spouses.⁸³ Likewise, the marital relationship does not negate the reality that each spouse exists and functions as an individual in fact.⁸⁴ Persons who choose to live in this matrimonial state are theoretically limiting satisfaction of their individual romantic, sexual, and procreation desires and needs to their marriage partners. There-

⁷⁷ See, e.g., *Lopez v. Waldrum Estate*, 249 Ark. 558, 564-65, 460 S.W.2d 61, 65 (1970) (mere fact that husband's cause of action is derivative does not mean that the actions cannot be prosecuted independently); *Blanken v. Braslow*, 130 N.J.L. 475, 476-77, 33 A.2d 742, 742-43 (1943) (husband suing for loss of consortium sues in his own right; husband and wife could have brought separate suits). But see *Eggert v. Working*, 599 P.2d 1389, 1390 (Alaska 1979).

⁷⁸ See *Gregory*, *supra* note 39, at 186.

⁷⁹ See *Sisemore v. Neal*, 236 Ark. 574, 575-77, 367 S.W.2d 417, 418-19 (1963).

⁸⁰ See, e.g., *Lansburgh & Bro., Inc. v. Clark*, 127 F.2d 331, 332-33 (D.C. Cir. 1942); *Felch v. General Rental Co.*, 1981 Mass. Adv. Sh. 1189, 1193, 421 N.E.2d 67, 71 (1981); *Elmore v. Illinois Terminal R.R. Co.*, 301 S.W.2d 44, 48 (Mo. Ct. App. 1957).

⁸¹ A statute of nonclaim is essentially a statute of limitations. See BLACK'S LAW DICTIONARY 948 (5th ed. 1979).

⁸² See *Lopez v. Waldrum Estate*, 249 Ark. 558, 564, 460 S.W.2d 61, 65 (1970).

⁸³ See *Montgomery v. Stephan*, 359 Mich. 33, 49 101 N.W.2d 227, 235 (1960); PROSSER, *supra* note 11, § 74, at 490 and § 122 at 861.

⁸⁴ See *supra* note 83.

fore, when one of the spouses is injured to the extent that he is unable to satisfy these desires and needs of the other spouse, the latter has suffered an actual, personal deprivation. In effect, denying the consortium spouse recovery of damages in such a situation penalizes that spouse for being faithful to the injured spouse and for maintaining the marital relationship.

The marital relationship is the foundation of the family unit, and the family has been recognized by the courts as the social unit upon which society rests.⁸⁵ Maintenance and protection of the family unit, therefore, has been considered important for the functioning and well-being of society.⁸⁶ Accordingly, it does not appear to be sound policy to penalize a person who chooses to enter into a marital relationship and to maintain that relationship faithfully, despite severe injuries to his spouse, by denying him recovery for loss of consortium.⁸⁷ Rather, the preferred policy would be to encourage the maintenance of the marital relationship and to recognize the existence of a distinct injury in such cases by allowing the consortium spouse full recovery of damages despite the injured spouse's contributory negligence.⁸⁸

In summary, the consortium claim arguably has all the requisites of a separate negligence action. The consortium spouse suffers a very real, personal loss. This loss is comprised of the physical, psychological, and emotional pain suffered personally by the consortium spouse, resulting from injuries to the other spouse.⁸⁹ Analyzing a loss of consortium claim in these terms strongly suggests that the claim is in no legally significant way dependent upon the legal right of the injured spouse to recover for his personal injury, just as the injured spouse's suit for injuries is not dependent on the consortium spouse's right to recover.⁹⁰ Moreover, the consortium claim has received independent treatment

⁸⁵ See, e.g., *Seidenberg v. Seidenberg*, 126 F. Supp. 19, 23 (1954), *aff'd* 225 F.2d 545 (1955); *Montgomery v. Stephan*, 359 Mich. 33, 48, 101 N.W.2d 227, 234 (1960); *Shelley v. Shelley*, 223 Or. 328, 340-41, 354 P.2d 282, 287-88 (1960).

⁸⁶ See *Montgomery v. Stephan*, 359 Mich. 33, 48, 101 N.W.2d 227, 234 (1960).

⁸⁷ Additionally, it is conceivable that denying the consortium spouse recovery for damages could lead to disruption of the marital relationship and the family unit by causing resentment and conflict between the spouses.

⁸⁸ It could be argued that the negligent third party should not have to pay additional money in damages simply because the injured spouse happens to be married. This argument, however, overlooks two important factors. First, it is foreseeable that the injured spouse will be married and that injury to the injured spouse will cause his spouse to suffer a loss. See *supra* notes 57-59 and accompanying text. In essence, the consortium spouse is a foreseeable plaintiff to whom the negligent third party owes a separate duty of care. See *supra* note 59 and accompanying text. Second, a fundamental principle of negligence law is that one whose negligence has caused damage to another should be liable for that damage. See *infra* note 131 and accompanying text. Furthermore, it is fundamental in the law of torts that, absent a statute or compelling public policy reasons, a person proximately injured by the act of another should be compensated. *Klein v. Klein*, 58 Cal.2d 692, 694-95, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962). The most compelling policy concern in the loss of consortium context is that which calls for the innocent consortium spouse to be fully compensated. See *infra* notes 130-36 and accompanying text.

⁸⁹ *Lantis v. Condon*, 95 Cal. App.3d 152, 157, 157 Cal. Rptr. 22, 24 (1979).

⁹⁰ See *Felch v. General Rental Co.*, 1981 Mass. Adv. Sh. 1189, 1194, 421 N.E.2d 67, 71 (1981).

in certain contexts. Finally, strong policy considerations suggest that the consortium action should be recognized as an independent claim. For these reasons, it is submitted that loss of consortium is most appropriately viewed as an independent cause of action which should not be affected by the injured spouse's contributory negligence. Indeed, these reasons alone are sufficient to justify the conclusion that loss of consortium is an independent cause of action. The view of loss of consortium as an independent cause of action is bolstered, however, by the failure of the derivative and fairness theories to accurately assess the loss of consortium action and its attendant concerns.

B. Critique of the Derivative and Fairness Theories

1. Derivative Theory

Under the derivative theory, the consortium spouse's recovery of damages for loss of consortium is related directly to the right of the injured spouse to recover damages for his own personal injuries.⁹¹ Although application of the derivative theory limits or bars the consortium spouse's recovery according to the injured spouse's negligence, the meaning of derivative is not entirely clear as it is used in the consortium context. Indeed, courts typically state that the consortium claim is derivative without then defining the meaning of derivative.⁹² In a narrow sense, derivative means that which does not have its origin in itself but is taken from another.⁹³ This meaning of the term derivative is the one employed in shareholders' derivative suits and in survival actions.⁹⁴ In shareholders' derivative suits and in survival actions, the plaintiff has a right to bring the action on behalf of another "person" in whom the claim originated.⁹⁵ In its broadest sense, however, derivative also could mean integrally related to and dependent upon the marital relationship and the injuries to the injured spouse. In other words, the consortium action "arises"⁹⁶ from or "acquires from"⁹⁷ the other spouse's injuries; it is "dependent" upon the right of the injured spouse to recover damages.⁹⁸ Regardless of which definition per-

⁹¹ See *supra* notes 26-30 and accompanying text.

⁹² See, e.g., *Nelson v. Busby*, 246 Ark. 247, 255, 437 S.W.2d 799, 803 (1969); *Hamm v. City of Milton*, 358 So.2d 121, 123 (Fla. Dist. Ct. App. 1978); *Peters v. Bodin*, 242 Minn. 489, 496; 65 N.W.2d 917, 922 (1954); *Elmore v. Illinois Terminal R.R. Co.*, 301 S.W.2d 44, 47 (Mo. Ct. App. 1957).

⁹³ BLACK'S LAW DICTIONARY 399 (5th ed. 1979).

⁹⁴ See *infra* notes 99-105 and accompanying text.

⁹⁵ See *infra* notes 99-105 and accompanying text.

⁹⁶ *Lantis v. Condon*, 95 Cal. App.3d 152, 157, 157 Cal. Rptr. 22, 24 (1979). (The California Court of Appeals indicated, however, that the view of the consortium action as derivative, as such, was not a sound one.) *White v. Lunder*, 66 Wis.2d 563, 568, 225 N.W.2d 442, 445 (1975) ("arises").

⁹⁷ See *Gregory*, *supra* note 39, at 183 (derivative is at least used in the sense of "acquiring from").

⁹⁸ See *Logullo v. Joannides*, 301 F. Supp. 722, 726 (D. Del. 1969); *Eggert v. Working*, 599 P.2d 1389, 1390 (Alaska 1979).

tains, however, a careful analysis indicates that the consortium claim is not properly a derivative action.

The narrow meaning of derivative, as originating in one party and passing to another, assumes that there is one claim on which two parties have a right to sue. There are instances where a claim originates in one party, who had a right to sue on it, and then passes to another party by operation of law or by voluntary transfer.⁹⁹ A prime example of such an instance is the stockholder's derivative suit. The cause of action in this situation belongs to the corporation, not to the shareholder who brings the suit.¹⁰⁰ The cause of action is based upon a primary right of the corporation, but it is asserted by the stockholder where the corporation has failed to act upon its primary right.¹⁰¹ Since the right to sue belongs to the corporation and is not a personal right of the shareholder, the cause of action is said to be derivative.¹⁰² Likewise, survival actions can be thought of as derivative, since the cause of action is one which belonged to the decedent, but upon which he is unable to sue because of his death.¹⁰³ The ac-

⁹⁹ 2 HARPER & JAMES, *supra* note 53, § 23.8, at 1278.

¹⁰⁰ *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 522 (1947).

¹⁰¹ *Schreiber v. Butte Copper & Zinc Co.*, 98 F. Supp. 106, 112 (S.D.N.Y. 1951).

¹⁰² *Id.* As a result of the corporate form, a loss experienced by the corporation has repercussions on the shareholders comprising the corporation. In this regard, the loss is "personal" to both the corporation and the shareholders. Nevertheless, the claim belongs to the corporation and the action is brought on behalf of the corporation by the shareholders. See *supra* notes 99-106 and accompanying text. In this sense, the shareholders' claim is derivative. See *supra* notes 99-106 and accompanying text. In contrast, the consortium spouse's claim for loss of consortium never belonged to the injured spouse. See *supra* note 90 and accompanying text. The consortium spouse, therefore, unlike the shareholders in a derivative suit, is bringing an independent cause of action for a claim which belongs only to that spouse; the injured spouse could not have brought a claim for the consortium spouse's loss of consortium. See *supra* notes 48-82 and 90 and accompanying text.

¹⁰³ Survival statutes typically provide that the personal representative of the deceased may bring an action, such as a tort action, on the deceased's behalf, for a cause of action which the deceased had before his death. See, e.g., IND. CODE ANN. § 34-1-1-1 (Burns 1973); MASS. GEN. STAT. ANN. ch. 228, § 1 (West 1958 & Supp. 1981); N.H. REV. STAT. ANN. § 556:9 (1974); S.C. CODE ANN. § 15-5-90 (Law Co-op. 1976). See generally 2 HARPER & JAMES, *supra* note 53, § 23.8, at 1281; PROSSER, *supra* note 11, § 127, at 902, 906. Such actions usually may be maintained, however, only where the deceased, had he lived, would have been entitled to maintain an action. See, e.g., IND. CODE ANN. § 34-1-1-1 (Burns 1973); See 2 HARPER & JAMES, *supra* note 53, § 23.8, at 1281-82; PROSSER, *supra* note 11, § 127, at 910. This limitation has been interpreted as requiring the deceased's contributory negligence to limit the cause of action and recovery of damages by the estate. See generally 2 HARPER & JAMES, *supra* note 53, § 23.8 at 1281 ("the surviving action is derivative in the fullest sense of the term, and the result . . . comes as near to being demanded by inexorable logic as anything does"); W. PROSSER, J. WADE, & V. SCHWARTZ, CASES AND MATERIALS ON TORTS, 589 (6th ed. 1976) [hereinafter cited as PROSSER, WADE & SCHWARTZ].

It also has been suggested that the consortium situation is analogous to that which exists in relation to wrongful death actions. See *Lantis v. Condon*, 95 Cal. App.3d 152, 158, 157 Cal. Rptr. 22, 25 (1979) (recognizing and rejecting the argument that the claim for loss of consortium is analogous to an action by heirs for the wrongful death of their decedent). Cf. *Callies v. Reliance Laundry Co.*, 188 Wis. 376, 381, 206 N.W. 198, 200 (1925) (action by parents for loss of services of child injured negligently by a third party).

Wrongful death statutes generally provide that the personal representative of the

tion is brought instead by the decedent's estate.¹⁰⁴ In both shareholders' derivative suits and survival actions, the claim originated in and belonged to one party, who had a right to sue on it, but it then passed to the plaintiff who ultimately brings the action.¹⁰⁵

Since a claim for loss of consortium never existed in the injured spouse in the first instance, however, these situations are inapposite to loss of consortium claims.¹⁰⁶ Loss of consortium is a claim which the injured spouse could never prosecute, assign, or destroy by settlement or judgment.¹⁰⁷ The injured spouse never possessed the consortium spouse's right to receive the injured spouse's society, affection, and services.¹⁰⁸ Rather, the affection, companionship, services, and the other items of consortium are personal rights of the consortium spouse.¹⁰⁹

Derivative, however, may not have this narrow meaning as it is used in the consortium context. Rather, the term may have the broader meaning that the consortium claim is directly dependent upon the marital relationship and upon the other spouse's injuries. In other words, no consortium claim would arise in the absence of the marital relationship and the injured spouse's injuries; accordingly, the consortium claim, for its existence, depends upon factors outside of the action by the consortium spouse against the negligent third party. Hence, the consortium claim, being dependent upon these factors for its existence, is seen as not being an independent cause of action. A cause of action can be independent, however, even if it would not have occurred in the absence of injuries to another or in the absence of a close familial relationship.¹¹⁰ The tort of infliction of severe emotional distress provides an example of such a situation.

deceased may bring an action for the loss suffered as a result of the death on behalf of the beneficiaries. *See, e.g.*, R.I. GEN. LAWS § 10-7-1 (1969); S.C. CODE ANN. §§ 15-51-10 and 15-51-20 (Law Co-op. 1977). *See generally* 2 HARPER & JAMES, *supra* note 53, § 23.8, at 1281 (wrongful death statutes cover the loss to the beneficiaries from the death); PROSSER, *supra* note 11, § 127, at 902, 906. As with survival actions, wrongful death actions usually may be maintained only where the deceased, had he lived, would have been able to maintain an action. *See, e.g.*, R.I. GEN. LAWS § 10-7-1 (1969); *see also* 2 HARPER & JAMES, *supra* note 11, § 127, at 910. In wrongful death actions, as in survival actions, the contributory negligence of the deceased limits the cause of action and recovery of the beneficiaries. *See* 2 HARPER & JAMES, *supra* note 53, § 23.8 at 1281. W. PROSSER, J. WADE & V. SCHWARTZ, *supra* at 589. This limitation, however, is contrary to what one might expect, because the wrongful death action is an independent cause of action. This limiting rule "is at best an anomaly and an anachronism resulting from the unique historical circumstances surrounding the development of a cause of action which was created entirely by statute." *Lantis v. Condon*, 95 Cal. App.3d 152, 158, 157 Cal. Rptr. 22, 25 (1979). Indeed, in California at least, the continued existence of the contributory negligence limitation in wrongful death actions is questionable. *Id.* There is no basis for imputing the deceased's negligence to the beneficiaries. 2 HARPER & JAMES, *supra* note 53, § 23.8, at 1281.

¹⁰⁴ *See supra* note 103.

¹⁰⁵ 2 HARPER & JAMES, *supra* note 53, § 23.8, at 1278.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* *See supra* note 90 and accompanying text.

¹⁰⁹ *See Lantis v. Condon*, 95 Cal. App.3d 152, 157, 157 Cal. Rptr., 22, 24 (1979).

¹¹⁰ *See infra* notes 111-23 and accompanying text.

When one intentionally or recklessly causes severe emotional distress to another by his extreme and outrageous conduct, he is liable to the other person for such emotional distress and for any bodily harm resulting from it.¹¹¹ For example, it has been suggested that such grounds for liability would exist where a person attempts to commit suicide in another's home by slitting his throat, knowing that there is a high degree of probability that the other person will return home and find him.¹¹² The other person must, of course, find him and suffer severe emotional distress for the tort to be complete.¹¹³ In this situation, the claim for severe emotional distress would not have arisen but for the injuries to the one attempting suicide.¹¹⁴ The fact that the injuries were the underlying "cause" of the severe emotional distress does not render this tort action any less independent. The cause of action gives to the individual suffering the severe emotional distress a personal right to recover for injuries that he, not the one attempting suicide, suffered as a result of the occurrence. Likewise, the cause of action for loss of consortium belongs to the consortium spouse. It is not made any less independent simply because it arises as a result of the injured spouse's personal injuries. Rather, the injured spouse's injuries are one of the circumstances giving rise to the consortium spouse's independent cause of action. In actions for the negligent infliction of severe emotional distress, the cause of action typically arises when a parent witnesses his child being injured or perceives such injuries shortly after they have been inflicted.¹¹⁵ Again, in such cases the parent's cause of action would not arise absent the injuries to his child.¹¹⁶ Yet, despite the "dependence" of the claim upon the injuries to the child, the parent nonetheless has an independent cause of action.¹¹⁷ In conso-

¹¹¹ RESTATEMENT (SECOND) OF TORTS § 46 (1965).

¹¹² *Id.* Comment i, illustration 16.

¹¹³ *Id.*

¹¹⁴ The cause of action for intentional or reckless infliction of severe emotional distress does not necessarily arise from any close relationship between the plaintiff and the injured person, and to this extent it is somewhat distinguishable from the loss of consortium action. Actions for intentional or reckless infliction of severe emotional distress are used here, however, only to show that a cause of action can be independent even though it arises from injuries to another person. Moreover, in actions for negligent infliction of severe emotional distress, the independent cause of action typically arises as a result of injuries to another person and is generally "dependent" on a close family relationship for its existence. See *infra* notes 115-23 and accompanying text. Actions for negligent infliction of severe emotional distress are therefore more closely analogous to actions for loss of consortium than are actions for intentional or reckless infliction of severe emotional distress.

¹¹⁵ See, e.g., *Dillon v. Legg*, 68 Cal.2d 728, 731, 441 P.2d 912, 914, 69 Cal. Rptr. 72, 74 (1968); *Dziokonski v. Babineau*, 375 Mass. 555, 557, 380 N.E.2d 1295, 1296 (1978); *Corso v. Merrill*, 119 N.H. 647, 649-50, 406 A.2d 300, 302 (1979); *Sinn v. Burd*, 486 Pa. 146, 150-51, 404 A.2d 672, 674 (1979).

¹¹⁶ A close relationship between the plaintiff and the injured person is a key factor in determining whether a cause of action for negligent infliction of mental distress exists. See *infra* notes 118-22 and accompanying text. The cause of action for negligent infliction of severe emotional distress is therefore analogous to the consortium action with respect to both the existence of a close relationship and the existence of injuries to the closely related individual.

¹¹⁷ See, e.g., *Dillon v. Legg*, 68 Cal.2d 728, 733-48, 441 P.2d 912, 916-25, 69 Cal. Rptr. 72, 76-85 (1968); *Dziokonski v. Babineau*, 375 Mass. 555, 568-69, 380 N.E.2d 1295, 1302

tium cases, the consortium spouse likewise should have an independent cause of action, despite the fact that the consortium claim arises from injuries to the other spouse.

Actions for severe emotional distress also provide support for the view that the consortium claim is no less independent simply because it arises from the marital relationship. Indeed, some courts consider one of the critical factors in determining whether a cause of action for the negligent infliction of severe emotional distress exists to be whether the plaintiff and the victim were closely related.¹¹⁸ A plaintiff who is closely related to the one suffering injuries is more likely to suffer severe emotional distress from observing these injuries.¹¹⁹ Also, the defendant is more likely to foresee that a closely related person will suffer severe emotional distress than to foresee that a stranger will do so.¹²⁰ The requirement that the plaintiff be closely related to the injured person in order to bring an action for negligent infliction of severe emotional distress, however, does not negate the fact that the cause of action is independent.¹²¹ Indeed, the independent cause of action exists in part because of the close relationship between the injured person and the plaintiff.¹²² Similarly, in the case of consortium actions the consortium claim exists because of the close relationship of the consortium spouse and the injured spouse. Nevertheless, as with actions for negligent infliction of severe emotional distress, the consortium claim should be recognized as an independent cause of action.¹²³ Although a spouse's cause of

(1978); *Corso v. Merrill*, 119 N.H. 647, 659, 406 A.2d 300, 308 (1979); *Sinn v. Burd*, 486 Pa. 146, 172-74, 404 A.2d 672, 686 (1979).

¹¹⁸ See, e.g., *Dillon v. Legg*, 68 Cal.2d 728, 741, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968); *D'Amicol v. Alvarez Shipping Co., Inc.*, 326 A.2d 129, 131 (Conn. Super. Ct. 1973) (incorporating the language of *Dillon*); *Dziokonski v. Babineau*, 375 Mass. 555, 568, 380 N.E.2d 1295, 1302 (1978); *Corso v. Merrill*, 119 N.H. 647, 653-54, 406 A.2d 300, 304 (1979).

¹¹⁹ *Dillon v. Legg*, 68 Cal.2d 728, 741, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

¹²⁰ *Id.*, 441 P.2d at 921, 69 Cal. Rptr. at 81.

¹²¹ See *Dillon v. Legg*, 68 Cal.2d 728, 733-48, 441 P.2d 912, 916-25, 69 Cal. Rptr. 72, 76-85 (1968); *Dziokonski v. Babineau*, 375 Mass. 555, 567-69, 380 N.E.2d 1295, 1301-03 (1978); *Corso v. Merrill*, 119 N.H. 647, 651-59, 406 A.2d 300, 303-08 (1979).

¹²² See *supra* notes 118 and 121 and accompanying text.

¹²³ The imputed negligence theory and the assignment theory, like the derivative theory, inaccurately assess the nature of the consortium action. See *supra* notes 22 and 30. Under the imputed negligence theory, the injured spouse's negligence is attributed to the consortium spouse as a result of the marriage relationship. See *supra* note 22. Although this theory may have been viable under the early common law view that the husband and wife were one legal entity, see *Lantis v. Condon*, 95 Cal. App.3d 152, 155, 157 Cal. Rptr. 22, 23 (1979), it has largely lost its persuasiveness in modern times. A principle of negligence law is that negligence is only imputed to a plaintiff if his relationship to the negligent party is of such a nature as to make the plaintiff liable for that person's negligence where it causes injury to a third person. 1 HARPER & JAMES, *supra* note 53, § 8.9 at 640. The husband, however, does not control the wife, particularly in the sense that he should be legally responsible for her actions. The common law notion that the wife was inferior to the husband has been repudiated; the husband and the wife now stand on equal footing, both legally and factually. See *Montgomery v. Stephan*, 359 Mich. 33, 45, 49, 101 N.W.2d 227, 233, 235 (1960). The negligence of one spouse should not be attributed to the other spouse, any more than it should be attributed to an unrelated individual. See PROSSER, *supra* note 11, § 74, at 490. Moreover, *Chicago, B. & Q. R.R. Co. v. Honey*, 63 F. 39 (8th Cir. 1894), a

action for loss of consortium "arises" from the marital relationship and from the personal injuries to the other spouse, the harm suffered by the consortium spouse is personal to that spouse.¹²⁴ Loss of consortium suffered by one spouse impairs interests which are "wholly separate and distinct" from those which are impaired by the personal injuries suffered by the other spouse.¹²⁵

To the extent that derivative is used in the consortium context to suggest the existence of only one claim for both the personal injuries of one spouse and the loss of consortium of the other spouse, the term is misused. Furthermore, even if derivative means simply that the consortium action is dependent upon a marital relationship and personal injuries of the injured spouse, such factual circumstances do not necessarily vitiate the independent legal status of the claim.¹²⁶ Indeed, policy considerations favoring and encouraging the marital relationship suggest that a spouse should not be penalized, in effect, for a loss suffered as a result of attempting to maintain that relationship when the other spouse is injured.¹²⁷

2. Fairness Theory

The derivative theory proposes that the consortium spouse's recovery of damages should be limited or barred by the injured spouse's negligence because of the nature of the consortium action itself.¹²⁸ In contrast, the fairness theory suggests that the consortium spouse's recovery of damages for loss of consortium should be limited or barred by the injured spouse's negligence because it is not fair to require a negligent third party to pay all of the damages

leading case supporting the imputed negligence theory, was explicitly disapproved in *Handeland v. Brown*, 216 N.W.2d 574, 576 (Iowa 1974).

In a more modern formulation of the imputed negligence theory, the Louisiana Court of Appeals determined that where the injured spouse was on a "community mission" at the time of the accident causing the injuries, that spouse's negligence would be imputed to the other spouse to deny recovery in a consortium action, at least where the injured spouse's negligence proximately caused the accident. *Walker v. Milton*, 253 So.2d 566, 568 (La. Ct. App. 1971), *aff'd on other grounds*, 263 La. 555, 268 So.2d 654 (1972). It is not clear, however, what the court of appeals meant by "community mission." To the extent that the theory imputes negligence from one spouse to another, the preceding criticisms apply.

The assignment theory suggests that there is only one cause of action, which belongs to the injured spouse, and that the part of his cause of action which is for loss of services to the consortium spouse is assigned to the consortium spouse by operation of law. See *supra* note 30. Since the assignment theory rests on the assumption that there is a sole cause of action for both the consortium claim and the personal injury claim, the theory is an inaccurate assessment of the nature of the consortium action. The consortium claim never existed in the injured spouse in the first place. 2 HARPER & JAMES, *supra* note 53, § 23.8, at 1278. It is a claim which the injured spouse could never assign, because there was never anything to assign. See *id.* The consortium claim is personal to the consortium spouse and only that spouse can sue for the elements of consortium. See *Lopez v. Waldrum Estate*, 249 Ark. 558, 564, 460 S.W.2d 61, 65 (1970).

¹²⁴ *Lantis v. Condon*, 95 Cal. App.3d 152, 157, 157 Cal. Rptr. 22, 24 (1979).

¹²⁵ *Id.*

¹²⁶ See *supra* notes 110-23 and accompanying text.

¹²⁷ See *supra* notes 83-88 and accompanying text.

¹²⁸ See *supra* notes 26-30 and accompanying text.

where the injured spouse's negligence contributed to some of the damage.¹²⁹ The most fundamental flaw in the fairness argument is its failure to consider the injustice inherent in denying an independent right of recovery to the consortium spouse. The question of fairness can be rephrased in terms of fairness to this spouse.¹³⁰ A fundamental principle of negligence law is that one whose negligence has caused damage to another should be liable for the damage.¹³¹ Thus, it would be a violation of this principle to allow a third party whose negligence has caused or contributed to the consortium spouse's loss to avoid some or all liability because of the conduct of the injured spouse.¹³² Another fundamental principle is that one whose negligence has contributed to his own injury should not be permitted to place the burden of liability on another.¹³³ This principle is violated where the consortium spouse, who is free from fault,¹³⁴ must suffer, in effect, a penalty in the form of reduced or no recovery because of the negligence of the injured spouse.¹³⁵ The injured spouse's negligence should not be attributed to the consortium spouse.¹³⁶

In the consortium context, the appropriate comparison is between the relative merits of the respective positions of the consortium spouse and the third party, not between the merits of the positions of the injured spouse and the third party. The faultless consortium spouse has suffered a very real and personal loss. In contrast, the negligent third party, responsible for at least some of the loss suffered by the consortium spouse, may have to bear more than his share of the damages payment. While it is not entirely fair to require the third party to bear the whole burden of payment, it is even less fair to allow the consortium spouse to remain uncompensated. Under these principles, it would be a worse evil to allow the negligent third party to escape liability than to permit a contributorily negligent injured spouse to profit indirectly from his own wrong.¹³⁷

The Supreme Court of Oregon in *Ross v. Cuthbert*¹³⁸ indicated that the logical consistency suggested by viewing consortium claims as independent is "highly desirable," but that the traditional rule is more in line with justice.¹³⁹

¹²⁹ See *supra* notes 31-37 and accompanying text.

¹³⁰ See *Fuller v. Buhrow*, 292 N.W.2d 672, 676 (Iowa 1980).

¹³¹ *Lantis v. Condon*, 95 Cal. App.3d 152, 159, 157 Cal. Rptr. 22, 25 (1979).

¹³² *Id.*, 157 Cal. Rptr. at 25-26.

¹³³ *Id.*, 157 Cal. Rptr. at 25.

¹³⁴ The consortium spouse's own contributory negligence would have an effect on that spouse's action. In jurisdictions adhering to the contributory negligence doctrine, the consortium action could not be maintained. Likewise, in comparative negligence jurisdictions, the consortium spouse's recovery would be reduced by the proportion of that spouse's negligence. See *supra* note 17.

¹³⁵ *Lantis v. Condon*, 95 Cal. App.3d 152, 159, 157 Cal. Rptr. 22, 26 (1979).

¹³⁶ See PROSSER, *supra* note 11, § 74, at 490.

¹³⁷ *Lantis v. Condon*, 95 Cal. App.3d 152, 160, 157 Cal. Rptr. 22, 26 (1979).

¹³⁸ 239 Or. 429, 397 P.2d 529 (1964).

¹³⁹ See *id.* at 434-35, 397 P.2d at 531. The *Ross* court noted that it was abiding by the "settled" rule. *Id.* at 435-36, 397 P.2d at 532. The settled rule notion is essentially an indication that the courts have followed this precedent for such a long time that it has gained the status of a

If it is conceded, however, that the claim for loss of consortium logically is a separate and distinct claim, then the fairness argument may be turned in favor of allowing the consortium spouse full recovery for the loss suffered. For example, some courts have held that while the contributory negligence of the injured spouse bars the other spouse from maintaining a consortium action, it does not affect the latter's action for property damages.¹⁴⁰ If consortium is viewed as a separate and distinct right,¹⁴¹ however, it hardly seems logical or fair to allow recovery for property damage but not for loss of consortium.¹⁴²

The various justifications advanced in support of the traditional view that the injured spouse's negligence should limit or bar the consortium spouse's recovery of damages actually may be manifestations of fairness concerns in relation to the negligent third party. These concerns may reflect a determination by the courts that it is not fair for a third party to pay all the damages in an action for loss of consortium when the negligent injured spouse was responsible for some of them.¹⁴³ Similarly, the courts may have concluded that it is not fair to allow a family to "team up" against a third party and allow the consortium spouse to recover in that spouse's name while the negligent spouse could not recover.¹⁴⁴ These considerations, however, overlook the competing concern of fairness to the consortium spouse.¹⁴⁵ A faultless consortium spouse should not have his recovery reduced or barred in order to protect a blameworthy party.¹⁴⁶ These competing concerns, however, need not be mutually exclusive. Indeed, the potential unfairness to both parties largely can be eliminated by granting the consortium spouse full recovery and allowing the negligent third party to obtain contribution from the negligent injured spouse.¹⁴⁷

C. Contribution and Loss of Consortium Actions

A major concern in consortium actions is to avoid placing an unfair burden on a third party who is not completely responsible for all of the consor-

justification in itself. *See supra* note 33. This response does not, however, answer the criticisms put forth in opposition to the rule. *Ross v. Cuthbert*, 239 Or. 429, 440, 397 P.2d 529, 533 (1964) (O'Connell, J., dissenting). It is a reflection of unquestioning reliance upon "settled" principles. By issuing this response, the court has not met its responsibility as an appellate court to "recognize only those principles of law that can be supported by sound reason." *Id.* (O'Connell, J., dissenting).

¹⁴⁰ *See, e.g., Peters v. Bodin*, 242 Minn. 489, 496-97, 65 N.W.2d 917, 922 (1954); *Deskins v. Woodward*, 483 P.2d 1134, 1136 (Okla. 1971).

¹⁴¹ *See supra* notes 48-82 and accompanying text.

¹⁴² *Macon v. Seaward Constr. Co., Inc.*, 555 F.2d 1, 2 (1st Cir. 1977); *Ross v. Cuthbert*, 239 Or. 429, 440-41, 397 P.2d 529, 534 (1964) (O'Connell, J., dissenting): "The majority opinion does not attempt to explain this glaring inconsistency." *Id.* The settled rule is possibly a reflection of disfavor with consortium actions and is tantamount to judicial legislation. *See id.* at 441, 397 P.2d at 534.

¹⁴³ *See Ross v. Cuthbert*, 239 Or. 429, 435, 397 P.2d 529, 531 (1964).

¹⁴⁴ *Id.*, 397 P.2d at 531-32.

¹⁴⁵ *See supra* notes 130-37 and accompanying text.

¹⁴⁶ *See supra* notes 131-37 and accompanying text.

¹⁴⁷ *See infra* notes 148-72 and accompanying text.

tium spouse's damage. A related concern, however, is to avoid precluding or reducing the consortium spouse's recovery when that spouse has not been contributorily negligent. In the past it seems that these two concerns were viewed as polar extremes. Yet, these apparently competing concerns need not be polarized; both of the concerns can be satisfied by permitting contribution¹⁴⁸ among all negligent parties, including the injured spouse. Moreover, awarding the consortium spouse full recovery and allowing contribution among the joint tortfeasors maintains the logical consistency achieved by granting the consortium spouse complete, independent recovery for a personal loss suffered by him.

At least two courts faced with the problem of meeting the supposedly conflicting fairness concerns have suggested a contribution-type method for solving the problem. In a jurisdiction adhering to the comparative negligence doctrine, the California Court of Appeals in *Lantis v. Condon*¹⁴⁹ pointed out that indemnity could be sought by the negligent third party from the negligent injured spouse.¹⁵⁰ Similarly, in a jurisdiction following the contributory negligence doctrine, the Supreme Court of Iowa, in *Fuller v. Buhrow*,¹⁵¹ noted that the negligent third party possibly could obtain contribution from the negligent in-

¹⁴⁸ Contribution is a method of distributing a plaintiff's loss among the tortfeasors whose negligence contributed to the loss. See PROSSER, *supra* note 11, § 51, at 310. See also *Knell v. Feltman*, 174 F.2d 662, 666 (D.C. Cir. 1949). The underlying principle of contribution is that when a tort is committed by the concurrent negligence of two or more persons, contribution should be enforced. Contribution applies in such a case because it is deemed unfair to let one bear the whole burden when two or more persons are responsible for the damage caused. See PROSSER, *supra* note 11, § 50, at 307; Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552, 568 (1936). Contribution essentially requires each wrongdoer to pay his appropriate share of the damages. See PROSSER, *supra* note 11, § 51, at 310. In some jurisdictions the apportionment of liability effected by contribution is determined by dividing the damages among the number of tortfeasors. See, e.g., *Early Settlers Ins. Co. v. Schweid*, 221 A.2d 920, 923 (D.C. 1966). See also RESTATEMENT (SECOND) OF TORTS § 886A(2), comment h (1979). In other jurisdictions, however, the distribution of liability by contribution is in proportion to the comparative fault of each defendant. See, e.g., *Bielski v. Schulze*, 16 Wis.2d 1, 6, 114 N.W.2d 105, 107 (1962); *Mitchell v. Branch*, 45 Hawaii 128, 141-42, 363 P.2d 969, 978 (1961). See also RESTATEMENT (SECOND) OF TORTS § 886A, comment h (1979).

¹⁴⁹ 95 Cal. App.3d 152, 157 Cal. Rptr. 22 (1979).

¹⁵⁰ See *id.* at 159, 157 Cal. Rptr. at 26. The California Court of Appeal used somewhat different terminology. It noted that a defendant could *cross-complain* against the contributory negligent spouse for indemnity. *Id.* (emphasis added). The *Lantis* court also noted that the injured spouse's liability should be discharged from his separate property before community property could be reached. *Id.*

Indemnity, unlike contribution, shifts the entire loss from one tortfeasor who has paid all of the damages to another tortfeasor who should be required to pay instead. See PROSSER, *supra* note 11, § 51, at 310. The California Supreme Court has modified the indemnity rule in California, however, to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis. See *American Motorcycle Ass'n v. Superior Court*, 20 Cal.3d 578, 598, 578 P.2d 899, 912, 146 Cal. Rptr. 182, 195 (1978). This partial indemnity doctrine produces results similar to those produced by contribution. See *id.* at 598-601, 578 P.2d at 912-13, 146 Cal. Rptr. at 195-97. See *supra* note 141. Indeed, the *Lantis* court relied upon *American Motorcycle Association* in reaching its conclusion as to cross-complaining for indemnity. See *Lantis v. Condon*, 95 Cal. App.3d 152, 159, 157 Cal. Rptr. 22, 26 (1979).

¹⁵¹ 292 N.W.2d 672 (Iowa 1980).

jured spouse.¹⁵² Although a system based upon comparative fault is ripe for the utilization of contribution among joint tortfeasors, the contribution solution need not be limited to comparative negligence jurisdictions.¹⁵³

Permitting full recovery to the consortium spouse and allowing the third party tortfeasor to seek contribution from the negligent injured spouse also is consistent with the view that the cause of action is independent. Contribution from the negligent injured spouse would be available in an action by the other spouse for physical injuries.¹⁵⁴ For example, in *State Farm Mutual Automobile Ins. Co. v. Westlake*,¹⁵⁵ the New York Court of Appeals noted that where the wife, a passenger in an automobile driven by her contributorily negligent husband, sustained physical injuries in a collision between the automobile driven by her husband and the automobile driven negligently by a third party, it was proper for the non-spouse defendant to seek contribution from the negligent spouse in the wife's suit for damages.¹⁵⁶ Viewing the consortium claim as an equally independent cause of action,¹⁵⁷ contribution should be available in this situation as well.¹⁵⁸ Thus, the logical consistency achieved by permitting the consortium spouse complete recovery for an independent, personal loss suffered by him does not have to be sacrificed to achieve an arguably "fair" result.

Logical consistency with the view that loss of consortium is an independent cause of action is not, however, the only result achieved by permitting contribution in the consortium context. As a result of requiring the injured spouse to contribute to the consortium spouse's recovery, rather than requiring the consortium spouse's award to be limited to the same extent that the injured spouse's recovery would be limited, the position of the consortium spouse is improved in a number of ways. For instance, in a contributory negligence jurisdiction, even though a contributorily negligent injured spouse's recovery

¹⁵² See *id.* at 676.

¹⁵³ A simple method for apportioning liability in a contributory negligence doctrine jurisdiction would be to divide the damages among the number of tortfeasors. See *supra* note 148. While this method may not be as fair as a method requiring *pro rata* apportionment of liability, it obviates the necessity of assigning percentages of fault in a jurisdiction adhering to contributory negligence doctrine. Also, it is certainly more equitable than requiring one party to pay all the damages.

¹⁵⁴ See *State Farm Mutual Automobile Ins. Co. v. Westlake*, 35 N.Y.2d 587, 590-91, 324 N.E.2d 137, 138-39, 364 N.Y.S.2d 482, 484-85 (1974). Contribution may not be available, however, if interspousal immunity exists in a given jurisdiction. See *infra* notes 173-79 and accompanying text.

¹⁵⁵ 35 N.Y.2d 587, 324 N.E.2d 137, 364 N.Y.S.2d 482 (1974).

¹⁵⁶ *Id.* at 590-91, 324 N.E.2d at 138-39, 364 N.Y.S.2d at 484-85. The availability of contribution depended, however, upon the absence of interspousal immunity in New York. *Id.* at 591, 324 N.E.2d at 139, 364 N.Y.S.2d at 485.

¹⁵⁷ See *supra* notes 48-82 and accompanying text.

¹⁵⁸ Where interspousal immunity exists, however, contribution may not be available. See *infra* notes 173-79 and accompanying text. Requiring contribution among all joint tortfeasors also is consistent with comparative fault principles, where they are applicable, in that both negligent persons whose concurring negligence contributed to the consortium spouse's injury would share the burden of payment of damages. See *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 828-29, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975).

may be barred, the consortium spouse would still be granted full recovery for his loss.¹⁵⁹ Likewise, in comparative negligence jurisdictions, the recovery of the consortium spouse would not be limited in any way by the injured spouse's negligence.¹⁶⁰ Furthermore, to the extent that the injured spouse is insured, the consortium spouse would receive independent compensation; there is not simply a shuffling of funds from one spouse to the other.¹⁶¹

A possible objection to the usefulness of contribution in the consortium context, however, is that if the injured spouse is uninsured, aside from paper shuffling, the overall result would be the same as that achieved under the traditional view that requires the consortium spouse's maintenance of an action or recovery of damages to be limited or barred by the injured spouse's negligence. For example, in a comparative negligence jurisdiction, reducing the consortium spouse's recovery by the percentage of the injured spouse's negligence arguably accomplishes the same result as allowing the consortium spouse full recovery and then requiring the injured spouse to pay his share of the damage award. This objection assumes, however, that the consortium spouse's award will become part of the "family treasury."¹⁶² To avoid this problem, the judgment paid by the negligent spouse should be taken from the spouse's separate property,¹⁶³ to the extent that such separate property is recognized in a given jurisdiction.¹⁶⁴ Likewise, the award received by the consortium spouse should become the consortium spouse's separate property.¹⁶⁵

Even if a jurisdiction fails to recognize separate property, contribution should still be allowed because it amounts to more than mere paper shuffling where the negligent spouse is insured¹⁶⁶ and instances where the negligent

¹⁵⁹ See *supra* note 14 and accompanying text and note 17.

¹⁶⁰ See *supra* note 14 and accompanying text and note 17.

¹⁶¹ Persons carry insurance to cover losses and liabilities. If the negligent injured spouse had caused a loss to an outside party, the insurance money would appropriately be used to compensate the loss. The consortium spouse, as a separate individual, should likewise be compensated. The marriage relationship should not be a basis for denying receipt of the insurance proceeds.

¹⁶² *Fuller v. Buhrow*, 292 N.W.2d 672, 676 (Iowa 1980).

¹⁶³ Indeed, the California Court of Appeal has pointed out that the injured spouse's liability should be discharged from that spouse's separate property before community property could be reached. *Lantis v. Condon*, 95 Cal. App.3d 152, 159, 157 Cal. Rptr. 22, 26 (1979).

¹⁶⁴ This separate property remedy may not be widely available, however, because many jurisdictions fail to recognize separate property in relation to proceeds received by a spouse in a tort action. See I. BAXTER, *MARITAL PROPERTY* §§ 14:1-14:9, at 225-37 (1973); A. CASNER, 2 *AMERICAN LAW OF PROPERTY* § 7.16 (1952 & Supp. 1960).

¹⁶⁵ Requiring the injured spouse to pay the consortium spouse's judgment from his separate property and requiring this damages payment to become the separate property of the consortium spouse conceivably could lead to marital disharmony. This argument, however, is highly speculative. It is by no means certain that such a requirement would result in marital disharmony. Indeed, it is likely that discord between the spouses over separate property will not arise unless they decide to obtain a divorce, and by that point the disruption of the marital harmony already would have occurred. Moreover, the instances in which the injured spouse will be uninsured are likely to be limited, so this concern is not a major one. See *infra* note 167 and accompanying text.

¹⁶⁶ See *supra* notes 159-61 and accompanying text.

spouse is not insured are likely to be rare, especially in automobile accident situations, and consortium claims typically arise in such situations.¹⁶⁷ Indeed, the results achieved under the traditional approach and the contribution approach are similar only where the injured spouse is uninsured. Even in this situation the results arguably are not the same because under the contribution approach the faultless consortium spouse is obtaining full recovery and the negligent injured spouse is required to contribute to the consortium spouse's award, whereas under the traditional approach, the faultless consortium spouse is denied some or all recovery whenever the injured spouse is negligent. In the loss of consortium context, the focus should be on the consortium spouse's rights, not upon the internal dynamics of the family unit as such.

The reason that the contribution approach produces a result similar to that produced under the traditional approach in this limited situation is because the injured spouse is uninsured, not because of any impact of the injured spouse's negligence on the consortium spouse's action or recovery. The contribution approach is consistent with the view that the consortium spouse has an independent cause of action and therefore should be granted full recovery despite the injured spouse's negligence. Disregarding the contribution approach to recovery for loss of consortium because it tends to produce a result similar to that produced by the traditional approach in a limited situation is inappropriate. Such disregard overlooks the overall benefit obtained by the consortium spouse under the contribution approach. Additionally, rejecting the contribution approach for this limited reason overlooks the independent nature of the consortium spouse's claim. Therefore, in order to maintain consistency, contribution should apply in a given situation whether the negligent spouse is insured or not.¹⁶⁸ Contribution is an appropriate method for apportioning liability where joint tortfeasors are involved.¹⁶⁹ Its use should not be denied simply because, in a limited context, it might lead to a result similar to that achieved under the traditional rule requiring the consortium spouse's recovery to be reduced according to the amount of the injured spouse's negligence.

There is a possibility, of course, that the injured spouse might be judgment proof. The injured spouse, therefore, will not be able to contribute his

¹⁶⁷ See, e.g., *Macon v. Seaward Constr. Co., Inc.*, 555 F.2d 1, 1 (1st Cir. 1977) (husband's car and defendant's truck collided); *Hamm v. City of Milton*, 358 So.2d 121, 122 (Fla. Dist. Ct. App. 1978) (automobile driven by wife collided with city truck; husband sued for loss of services); *Peters v. Bodin*, 242 Minn. 489, 491, 65 N.W.2d 917, 919 (1954) (action for injuries and damages arising out of an automobile accident); *Ross v. Cuthbert*, 239 Or. 429, 430-31, 397 P.2d 529, 529-30 (1964) (pickup truck driven by husband struck from the rear by automobile driven by defendant; wife sued for loss of consortium).

¹⁶⁸ Where the injured spouse is insured, the insurance proceeds could be required to become part of the consortium spouse's property as in the situation where the injured spouse is uninsured. See *supra* notes 164-65 and accompanying text. Disruption of the marital harmony in this context is much less likely than in cases where the injured spouse is uninsured because the consortium spouse's judgment is being paid by an insurance company; the payment is not coming directly from the injured spouse's own assets.

¹⁶⁹ See *supra* note 148.

share of the payment of the consortium spouse's judgment. In such circumstances, the negligent third party may be required to pay the entire amount of damages to the consortium spouse.¹⁷⁰ This requirement places an additional burden on the negligent third party, but equity sometimes requires that the share of an insolvent tortfeasor be borne by the other tortfeasors.¹⁷¹

Essentially, fairness to all parties is achieved by permitting contribution and by requiring the consortium award, where possible, to become the separate property of the consortium spouse. A portion of the damages recovered by the consortium spouse where contribution is allowed comes from the negligent injured spouse. It is not as though the injured spouse is escaping liability and the third party is bearing the full burden. The negligent injured spouse is actually having his own recovery reduced in his action for personal injuries and also is paying part of the damages awarded to the other spouse. The negligent third party, on the other hand, is required to pay only his appropriate share of the judgment. Furthermore, the faultless consortium spouse is allowed to recover in full. The potential unfairness of excessive damages awards is not a major concern because the courts generally have the ability to find such awards excessive and to require them to be reduced accordingly.¹⁷² To the extent that courts espousing the derivative rationale and other arguments in favor of the settled rule do so because of underlying fairness concerns, perhaps this contribution solution will lead to a reassessment of the validity of such rationales. Courts may be more willing to determine that loss of consortium is actually an independent cause of action.

1. Interspousal Immunity and Contribution in Consortium Actions

The success of contribution as a means for dealing with the consortium recovery problem may, however, be largely a function of whether a given jurisdiction has abolished interspousal immunity.¹⁷³ The interspousal immuni-

¹⁷⁰ See PROSSER, *supra* note 11, § 50, at 310. A principle of tort law is that where the negligences of two or more parties combine to produce a single, indivisible injury, the tortfeasors are jointly and severally liable for the whole damage. See *Arnst v. Estes*, 136 Me. 272, 275, 8 A.2d 201, 203 (1939).

¹⁷¹ See PROSSER, *supra* note 11, § 50, at 310. These equity concerns are particularly pertinent where the plaintiff is free from fault.

¹⁷² See, e.g., *Missouri Pac. Transp. Co. v. Miller*, 227 Ark. 351, 364, 299 S.W.2d 41, 48-49 (1957); *Hodges v. Johnson*, 417 S.W.2d 675, 693 (Mo. Ct. App. 1967).

¹⁷³ See, e.g., *Fuller v. Buhrow*, 292 N.W.2d 672, 676 (Iowa 1980) (abrogation of interspousal immunity doctrine removes impediments to obtaining contribution from negligent spouse in consortium claims); *Felch v. General Rental Co.*, 1981 Mass. Adv. Sh. 1189, 1196, 421 N.E.2d 67, 72 (1981) (loss of consortium is one area in which interspousal immunity still applies and thus contribution cannot be obtained from the negligent spouse).

While providing an in-depth analysis of the arguments for and against the interspousal immunity doctrine is beyond the scope of this note, this note reviews the various arguments and examines their relative merits. Interspousal immunity is discussed here because it might prevent contribution in consortium actions in jurisdictions where the doctrine exists in that context. Accordingly, it is urged that interspousal immunity be abolished in relation to loss of consortium

ty doctrine prevents one spouse from bringing a tort action against the other spouse.¹⁷⁴ Accordingly, since liability does not exist between the spouses, arguably, there can be no joint liability between a spouse and a third person.¹⁷⁵ Although it is possible to require contribution from one spouse in a suit against a third party by the other spouse even where interspousal immunity exists,¹⁷⁶ interspousal immunity may preclude contribution in such a case,¹⁷⁷ especially since the right of contribution arises from a joint liability.¹⁷⁸ Contribution from the injured spouse, therefore, may not be available in loss of consortium actions.¹⁷⁹

Until recently, interspousal immunity was the prevailing rule in most states.¹⁸⁰ Today, however, the interspousal immunity doctrine has been abandoned or curtailed by a majority of jurisdictions.¹⁸¹ Various arguments have been propounded in favor of interspousal immunity. The original justification for the doctrine was based upon the historical notion of the unity of a husband and wife.¹⁸² Aside from this early justification, four major reasons have been

actions, at least insofar as contribution is concerned. *See generally*, Annot., 92 A.L.R. 3d 901 (1979 & Supp. 1982).

¹⁷⁴ *See* *Yellow Cab Co. v. Dreslin*, 181 F.2d 626, 627 (D.C. Cir. 1950).

¹⁷⁵ *See id.*

¹⁷⁶ *See, e.g.*, *Puller v. Puller*, 380 Pa. 219, 221, 110 A.2d 175, 177 (1975) (a tortfeasor has a right to contribution against a joint tortfeasor even though the plaintiff is precluded from enforcing liability against the joint tortfeasor because the latter is the plaintiff's wife); *Zarella v. Miller*, 100 R.I. 545, 547, 217 A.2d 673, 675 (a spouse, though immune from suit by the other spouse, is a joint tortfeasor and therefore liable for purposes of contribution). *See also* *Renfrow v. Gojohn*, 600 S.W.2d 77, 79, 81-82 Appendix C (Mo. Ct. App. 1980).

¹⁷⁷ *See* *Felch v. General Rental Co.*, 1981 Mass. Adv. Sh. 1189, 1196, 421 N.E.2d 67, 72 (1981); *Renfrow v. Gojohn*, 600 S.W.2d 77, 79, 81 Appendix C (Mo. Ct. App. 1980).

¹⁷⁸ *See* *Yellow Cab Co. v. Dreslin*, 181 F.2d 626, 627 (D.C. Cir. 1950).

¹⁷⁹ *See, e.g.*, *Fuller v. Buhrow*, 292 N.W.2d 672, 676 (Iowa 1980) (abrogation of interspousal immunity doctrine removes impediments to obtaining contribution from negligent spouse in consortium claims); *Felch v. General Rental Co.*, 1981 Mass. Adv. Sh. 1189, 1196, 421 N.E.2d 67, 72 (1981) (loss of consortium is one area in which interspousal immunity still applies and thus contribution cannot be obtained from the negligent spouse).

¹⁸⁰ *See* *Self v. Self*, 58 Cal.2d 683, 684-86, 376 P.2d 65, 66, 26 Cal. Rptr. 97, 98 (1962); *Lewis v. Lewis*, 370 Mass. 619, 623, 351 N.E.2d 526, 528 (1976).

¹⁸¹ *See* *MacDonald v. MacDonald*, 412 A.2d 71, 73 n.3 (Me. 1980) (the majority of jurisdictions in ever increasing numbers have rejected the doctrine of interspousal immunity); *Renfrow v. Gojohn*, 600 S.W.2d 77, 78, 80-81 Appendices A and B (1980) (the interspousal immunity doctrine has been completely abolished in a majority of states and partially abrogated in several other states). *See, e.g.*, *Lewis v. Lewis*, 370 Mass. 619, 629-30, 351 N.E.2d 526, 532 (1976) (interspousal tort immunity no longer a bar to action by one spouse against another for injuries arising out of an automobile accident); *Beaudette v. Frana*, 285 Minn. 366, 373, 173 N.W.2d 416, 420 (1969) (the absolute defense of interspousal immunity in actions for tort is abrogated); *Bounds v. Caudle*, 560 S.W.2d 925, 927 (Tex. 1977) (interspousal tort immunity abolished to the extent that it would bar claims for willful or intentional torts). *Freehe v. Freehe*, 81 Wash.2d 183, 192, 500 P.2d 771, 777 (1972) (the rule of interspousal disability in personal injury cases is abandoned). *See generally* Annot., 92 A.L.R.3d 901 (1979 & Supp. 1982).

¹⁸² *See* *Self v. Self*, 58 Cal.2d 683, 684, 376 P.2d 65, 65-66, 26 Cal. Rptr. 97, 97-98 (1962); *MacDonald v. MacDonald*, 412 A.2d 71, 72-73 (Me. 1980); *Lewis v. Lewis*, 370 Mass. 619, 620-21, 351 N.E.2d 526, 527-28 (1976); *Freehe v. Freehe*, 81 Wash.2d 183, 185-86, 500 P.2d 771, 773-74 (1972).

advanced in support of the continued application of the interspousal immunity doctrine. First, the destruction of peace and tranquility in the home likely to result from allowing one spouse to sue another in tort has been suggested as a justification for the immunity.¹⁸³ Second, the argument has been made that the interspousal immunity rule prevents fraud or collusion where one or both spouses carry liability insurance.¹⁸⁴ Third, the contention has been advanced that abrogation of interspousal immunity would flood the courts with trivial, burdensome matrimonial disputes.¹⁸⁵ Finally, it has been suggested that any change in the status of the interspousal immunity doctrine should be made by legislatures, not courts.¹⁸⁶

In abrogating or restricting interspousal immunity, courts have considered the various arguments proposed in favor of the doctrine. For example, the early notion of the legal unity of husband and wife has been recognized as no longer a valid concept.¹⁸⁷ Husband and wife are regarded as separate individuals in modern society.¹⁸⁸ Therefore, courts have determined that the concept of the legal unity of husband and wife is no longer a satisfactory basis for a rule of interspousal tort immunity.¹⁸⁹

The argument that the family peace and tranquility would be destroyed by allowing one spouse to sue another also has been rejected.¹⁹⁰ One court has suggested that if a state of peace exists in the home, then either no action will be commenced, or the spouses will allow the action to continue only so long as their domestic harmony is not jeopardized.¹⁹¹ Moreover, the same court noted that if domestic peace and tranquility is nonexistent or tenuous before the claim

¹⁸³ See *Klein v. Klein*, 58 Cal.2d 692, 694, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); *MacDonald v. MacDonald*, 412 A.2d 71, 73 (Me. 1980); *Lewis v. Lewis*, 370 Mass. 619, 623-24, 351 N.E.2d 526, 529 (1976); *Freehe v. Freehe*, 81 Wash.2d 183, 187, 500 P.2d 771, 774 (1972).

¹⁸⁴ See *Klein v. Klein*, 58 Cal.2d 692, 694, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); *MacDonald v. MacDonald*, 412 A.2d 71, 73 (Me. 1980); *Lewis v. Lewis*, 370 Mass. 619, 623-24, 351 N.E.2d 526, 529 (1976); *Freehe v. Freehe*, 81 Wash.2d 183, 188, 500 P.2d 771, 775 (1972).

¹⁸⁵ See *Klein v. Klein*, 58 Cal.2d 692, 694, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); *Freehe v. Freehe*, 81 Wash.2d 183, 188, 500 P.2d 771, 775 (1972).

¹⁸⁶ See *MacDonald v. MacDonald*, 412 A.2d 71, 73-75 (Me. 1980); *Lewis v. Lewis*, 370 Mass. 619, 624-28, 351 N.E.2d 526, 531-32 (1976); *Freehe v. Freehe*, 81 Wash.2d 183, 189, 500 P.2d 771, 775-76 (1972).

¹⁸⁷ See *MacDonald v. MacDonald*, 412 A.2d 71, 72-73 (Me. 1980); *Lewis v. Lewis*, 370 Mass. 619, 621-22, 351 N.E.2d 526, 527-28 (1976); *Freehe v. Freehe*, 81 Wash.2d 183, 186-87, 500 P.2d 771, 773-74 (1972).

¹⁸⁸ See *MacDonald v. MacDonald*, 412 A.2d 71, 72-73 (Me. 1980); *Lewis v. Lewis*, 370 Mass. 619, 622, 351 N.E.2d 526, 528 (1976); *Freehe v. Freehe*, 81 Wash.2d 183, 186-87, 500 P.2d 771, 774 (1972).

¹⁸⁹ See, e.g., cases cited *supra* at note 188.

¹⁹⁰ See, e.g., *Klein v. Klein*, 58 Cal.2d 692, 694, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); *MacDonald v. MacDonald*, 412 A.2d 71, 73 (Me. 1980); *Lewis v. Lewis*, 370 Mass. 619, 624, 351 N.E.2d 526, 529 (1976); *Freehe v. Freehe*, 81 Wash.2d 183, 187, 500 P.2d 771, 774 (1972).

¹⁹¹ See, *Freehe v. Freehe*, 81 Wash.2d 183, 187, 500 P.2d 771, 774 (1972).

arises, disallowing a law suit is more likely to create unrest, rather than harmony.¹⁹²

The contention that abrogating interspousal immunity will lead to fraud or collusion where one or both spouses carry liability insurance likewise has been rejected by the courts.¹⁹³ This argument, it has been noted, assumes that courts and juries cannot distinguish fraudulent claims from legitimate ones.¹⁹⁴ This notion has been criticized on the grounds that the general ethics and honor of the citizenry and the abilities of judges and jurors to distinguish spurious claims from valid ones can serve as safeguards in respect to the fraud problem.¹⁹⁵ Courts have recognized that spouses should not be denied a cause of action simply because the possibility of fraud exists.¹⁹⁶ Moreover, one court suggested that if the judicial processes are inadequate safeguards against fraud, then the legislature should deal with the problem.¹⁹⁷

With regard to the argument that permitting litigation between spouses would inundate the courts with a burdensome amount of trivial matrimonial disputes, courts have recognized that no such inundation has occurred in states which have abolished interspousal immunity.¹⁹⁸ This argument has been considered unsound insofar as it rests upon the mere possibility of such trivial lawsuits.¹⁹⁹ Accordingly, courts have determined that this contention provides insufficient support for the continued maintenance of the interspousal immunity rule.²⁰⁰

Finally, courts typically have rejected the argument that abrogation of interspousal immunity is a matter for legislative action only.²⁰¹ In rejecting this contention, courts have recognized that interspousal immunity is a common law doctrine, not a legislative rule.²⁰² Accordingly, these courts have determined that judicial abrogation of the doctrine is appropriate.²⁰³

¹⁹² See *id.*

¹⁹³ See, e.g., *Klein v. Klein*, 58 Cal.2d 692, 694-96, 376 P.2d 70, 72-73, 26 Cal. Rptr. 102, 104-05 (1962); *MacDonald v. MacDonald*, 412 A.2d 71, 73 (Me. 1980); *Lewis v. Lewis*, 370 Mass. 619, 624, 351 N.E.2d 526, 529 (1976); *Freehe v. Freehe*, 81 Wash.2d 183, 188-89, 500 P.2d 771, 775 (1972).

¹⁹⁴ See *Freehe v. Freehe*, 81 Wash.2d 183, 188-89, 500 P.2d 771, 775 (1972).

¹⁹⁵ See *MacDonald v. MacDonald*, 412 A.2d 71, 73 (Me. 1980); *Freehe v. Freehe*, 81 Wash.2d 183, 189, 500 P.2d 771, 775 (1972).

¹⁹⁶ See, e.g., cases cited *supra* at note 195.

¹⁹⁷ See *Freehe v. Freehe*, 81 Wash.2d 183, 189, 500 P.2d 771, 775 (1972).

¹⁹⁸ See, e.g., *Klein v. Klein*, 58 Cal.2d 692, 694, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); *Freehe v. Freehe*, 81 Wash.2d 183, 188, 500 P.2d 771, 775 (1972).

¹⁹⁹ See *Klein v. Klein*, 58 Cal.2d 692, 694, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); *Freehe v. Freehe*, 81 Wash.2d 183, 188, 500 P.2d 771, 775 (1972).

²⁰⁰ See, e.g., cases cited *supra* at note 199.

²⁰¹ See, e.g., *MacDonald v. MacDonald*, 412 A.2d 71, 73-75 (Me. 1980); *Lewis v. Lewis*, 370 Mass. 619, 627-29, 351 N.E.2d 526, 531-32 (1976); *Freehe v. Freehe*, 81 Wash.2d 183, 189, 500 P.2d 771, 775-76 (1972).

²⁰² See, e.g., *MacDonald v. MacDonald*, 412 A.2d 71, 73-74 (Me. 1980); *Lewis v. Lewis*, 370 Mass. 619, 627-29, 351 N.E.2d 526, 531-32 (1976); *Freehe v. Freehe*, 81 Wash.2d 183, 189, 500 P.2d 771, 773 (1972).

²⁰³ See, e.g., *MacDonald v. MacDonald*, 412 A.2d 71, 73-74 (Me. 1980); *Lewis v.*

In support of the abolition of the interspousal immunity doctrine, courts have indicated that a fundamental principle in the law of torts is that absent a statute or compelling reasons of public policy, a person wrongfully injured by another should be compensated for the harm suffered.²⁰⁴ Similarly, strong policy considerations favoring immunity are necessary to justify a judicially created immunity for tortfeasors.²⁰⁵ Since the reasons advanced in support of the interspousal immunity rule have been determined to be inadequate to justify the rule,²⁰⁶ the requisite compelling policy concerns supporting the rule are absent. Accordingly, a majority of jurisdictions have abolished the interspousal immunity doctrine.²⁰⁷

The reasons advanced by the courts in support of abrogation of interspousal immunity provide sound justification for abandoning the rule. This note, therefore, urges that the interspousal immunity doctrine be abolished in jurisdictions retaining it²⁰⁸ in the context of loss of consortium actions. The doctrine should be abrogated to the extent that it exists as an impediment to contribution from the negligent injured spouse in loss of consortium actions. If a jurisdiction is unwilling to abolish interspousal immunity completely, partial abrogation of the rule is possible.²⁰⁹ Indeed, limited abrogation of the doctrine has taken place in some jurisdictions with respect to automobile accidents.²¹⁰ Actions for loss of consortium frequently arise in this setting.²¹¹ Total or partial abrogation of interspousal immunity would remove the impediment to gaining contribution from the negligent injured spouse.²¹² It would thus make available a valuable method for dealing with the fairness concerns, discussed previously,²¹³ while at the same time achieving a logically consistent result.

In theory, if interspousal immunity is abolished, the consortium spouse should be able to sue the injured spouse directly. This result is appropriate if a

Lewis, 370 Mass. 619, 627-30, 351 N.E.2d 526, 531-32 (1976); *Freehe v. Freehe*, 81 Wash.2d 183, 189-92, 500 P.2d 771, 775-77 (1972).

²⁰⁴ See, e.g., *Klein v. Klein*, 58 Cal.2d 692, 694-95, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); *Lewis v. Lewis*, 370 Mass. 619, 629, 351 N.E.2d 526, 532 (1976).

²⁰⁵ See *Lewis v. Lewis*, 370 Mass. 619, 629, 351 N.E.2d 526, 532 (1976).

²⁰⁶ See *supra* notes 180-96 and accompanying text.

²⁰⁷ See *supra* note 181 and accompanying text.

²⁰⁸ Only a minority of jurisdictions still retain the interspousal immunity doctrine. See *supra* note 181 and accompanying text.

²⁰⁹ See *supra* note 181 and accompanying text. See also *infra* note 210 and accompanying text.

²¹⁰ See, e.g., *Lewis v. Lewis*, 370 Mass. 619, 629-30, 351 N.E.2d 526, 532 (1976); *Rupert v. Stienne*, 90 Nev. 397, 404, 528 P.2d 1013, 1017 (1974); *Digby v. Digby*, 388 A.2d 1, 4 (R.I. 1978); *Richard v. Richard*, 131 Vt. 98, 106, 300 A.2d 637, 641 (1973).

²¹¹ See, e.g., *Macon v. Seaward Constr. Co., Inc.*, 555 F.2d 1, 1 (1st Cir. 1977) (husband's car and defendant's truck collided); *Hamm v. City of Milton*, 358 So.2d 121, 122 (Fla. Dist. Ct. App. 1978) (automobile driven by wife collided with city truck; husband sued for loss of services); *Peters v. Bodin*, 242 Minn. 489, 491, 65 N.W.2d 917, 919 (1954) (action for injuries and damages arising out of an automobile accident); *Ross v. Cuthbert*, 239 Or. 429, 430-31, 397 P.2d 529, 529-30 (1964) (pickup truck driven by husband struck from the rear by automobile driven by defendant; wife sued for loss of consortium).

²¹² See *Fuller v. Buhrow*, 292 N.W.2d 672, 676 (Iowa 1980).

third party also is involved; the grounds for an action for loss of consortium are largely predicated on wrongdoing by a third person.²¹⁴ There must be a limit imposed, however, where the consortium spouse attempts to sue the injured spouse who was one hundred percent negligent. First, such an action is not contemplated within the nature of the consortium action because the consortium action assumes the existence of a third party tortfeasor.²¹⁵ Second, such an action should not be allowed as a matter of policy, since it would open the door to potentially collusive or frivolous claims. If it were allowed, one spouse could sue another who negligently fell from a roof or who planned such an injury with the other spouse. These sorts of suits do not arise in situations which the consortium action seeks to remedy.²¹⁶ For these reasons, the ability of the consortium spouse to recover from the injured spouse should be limited to cases where a third party tortfeasor also is involved. With this limitation upon the consortium action, contribution can be an effective method for achieving just results where joint tortfeasors are involved.

CONCLUSION

The traditional rule for consortium actions requires the consortium spouse's recovery of damages for loss of consortium to be limited or barred to the same extent that the injured spouse's recovery of damages in his action for personal injuries would be limited or barred. One of the main theories espoused in support of this rule suggests that the consortium action is derivative, or otherwise dependent upon the injured spouse's right to recover damages for his own personal injuries. Additionally, the traditional rule has been regarded as achieving fair results in relation to the negligent third party because it relieves him from bearing the whole burden of compensating the consortium spouse.

Some modern courts have rejected the traditional rule, however, and have held that the negligence of the injured spouse has no effect on the consortium

²¹³ See *supra* notes 31-37 and 130-46 and accompanying text.

²¹⁴ See *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 167-68, 302 N.E.2d 555, 564 (1973) (a claim for loss of consortium arises "from personal injury of the other spouse caused by negligence of a third person . . ."); *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978) ("either spouse has a cause of action for loss of consortium that might arise as a result of an injury caused to the other spouse by a third party tortfeasor's negligence").

²¹⁵ See *supra* note 214 and accompanying text.

²¹⁶ That is, the consortium action is based upon involvement of a negligent third party. See *supra* note 214 and accompanying text. This does not have to mean that the negligent spouse cannot be held liable to the consortium spouse as well, as long as a nonspouse is also a defendant. See *Lantis v. Condon*, 95 Cal. App.3d 152, 159, 157 Cal. Rptr. 22, 26 (1979) (indirectly by allowing a third party to receive indemnification from negligent injured spouse); *Fuller v. Buhrow*, 292 N.W.2d 672, 676 (Iowa 1980). Rather, the suggestion here is that at least one of the persons liable to the plaintiff/consortium spouse must be a negligent third party. This requirement helps to eliminate collusive or frivolous suits since there is a definite outside wrong committed against the consortium spouse. Also, fairness is achieved by allowing the negligent spouse to contribute to the payment of damages, since both that spouse and the negligent third party contributed to the consortium spouse's loss.

spouse's recovery of damages. These courts hold that the consortium claim is independent of and distinct from the injured spouse's claim; the consortium claim is not derivative. This note submits that this is the preferred view. Moreover, these courts indicate that the greater fairness concern suggests that the faultless consortium spouse should not have his recovery reduced or denied so that a negligent party can be relieved of liability.

At any rate, fairness concerns pertaining to both the negligent third party and the consortium spouse can be quieted by allowing the third party to seek contribution from the negligent spouse. By permitting contribution, the consortium spouse can obtain recovery in full, and the negligent third party will bear only his share of the damages. The success of contribution in the consortium context depends largely, however, upon the status of interspousal immunity in a given jurisdiction. It is urged that this immunity be abolished in jurisdictions that have not yet done so, at least to the extent that the doctrine prevents contribution in consortium actions. Permitting contribution is consistent with the view of consortium as an independent cause of action; it also achieves fairness to all concerned. Moreover, the availability of contribution in consortium actions may lead to a reassessment of the traditional rule by those courts that still adhere to it.

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